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COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 2

Life
Positive obligations

Failure of authorities to protect life of a journalist following death threats: *violation*

Dink v. Turkey - 2668/07 et al.
Judgment 14.9.2010 [Section II]

(See Article 10 below, page 24)

ARTICLE 3

Inhuman or degrading treatment

Sentence of life imprisonment with no possibility of commutation but not *de jure* and *de facto* irreducible: *no violation*

Iorgov v. Bulgaria (no. 2) - 36295/02
Judgment 2.9.2010 [Section V]

Facts – The applicant was sentenced to death for various crimes. However, following a moratorium on executions and the subsequent abolition of the death penalty, his sentence was replaced by one of life imprisonment without the possibility of commutation; he is currently serving that sentence.

Law – Article 3: The applicant, having been sentenced to life imprisonment without commutation, could not be released on licence under domestic law, since that measure was applicable only to prisoners serving fixed-term sentences. Nor could his sentence be commuted to a fixed-term sentence. Nevertheless, the possibility of an adjustment of his sentence, and of his eventual release, did exist in domestic law in the form of a pardon or commutation by the Vice-President. It followed that a life sentence without commutation was not an irreducible penalty *de jure*.

The granting of clemency by the Vice-President was a well-known remedy widely used by prisoners. The penalty of a life sentence without commutation had been introduced into the Criminal Code in December 1998, as a result of the abolition of the death penalty. However, in view of the date on which the moratorium on executions had been introduced pending the abolition of the death penalty and the time that had elapsed between the introduction of life sentences without commutation and the examination of the present case, it was unlikely that a large number of prisoners in this category would already have spent more than twenty years in detention. Under domestic law even an ordinary life sentence, which was considered a less severe penalty, could not be commuted by the courts until the offender had served twenty years in prison. Accordingly, the absence of any measures of clemency by November 2009 could not give rise to the conclusion that the Bulgarian system was not functional. An examination of practical situations as they unfolded in the future would be necessary to determine how applications for clemency by persons sentenced to life imprisonment without commutation were examined by the Vice-President and in what circumstances, if any, measures of clemency were granted. Since the Court was confined to reviewing the circumstances of the case, it could not accept the applicant's claim that the system in question would not be effective. By the time the applicant had lodged his complaint in August 2002, he had served only thirteen years of his life sentence. Moreover, he had submitted an application for presidential clemency, which had been examined and rejected by the appropriate committee. Neither the legislation nor the authorities prevented him from submitting a new application to the Vice-President. The Court could not speculate as to whether he would one day be set free and, if so, after how many years; it was for the domestic authorities to make that decision in the light of the circumstances at the time they examined his application. Accordingly, it had not been proved beyond reasonable doubt that the applicant would never have his sentence reduced in practice. It had not been established that, as matters stood, the applicant was deprived of all hope of being released from prison one day.

Conclusion: no violation (unanimously).

The Court also found no violation of Article 3 on account of the conditions of the applicant's detention or the quality of the medical care he received in prison, and no violation of Article 5 § 4.

(See also *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, Information Note no. 105)

Passive smoking in prison: *violation*

Florea v. Romania - 37186/03
Judgment 14.9.2010 [Section III]

Facts – In 2002 the applicant, who suffered from chronic hepatitis and arterial hypertension, was

imprisoned. For approximately nine months he shared a cell with between 110 and 120 other prisoners, with only 35 beds. According to the applicant, 90% of his cellmates were smokers. In response to his complaints the Ministry of Justice acknowledged that due to overcrowding two prisoners sometimes had to share a bed and that it was not possible to separate smoking and non-smoking prisoners. Due to his worsening health, the applicant spent three periods in the prison hospital, where he was also in the company of smokers. A medical report dated January 2005 found that he was suffering from a number of disorders and should avoid tobacco smoke. He was granted conditional release in February 2005. In the meantime he had lodged a claim for compensation alleging that the deterioration in his health had been caused by passive smoking and his poor conditions of detention. The court rejected his claim in 2006, finding that no causal link had been established between his health problems and the conditions in which he had been detained.

Law – Article 3: (a) *Overcrowding* – The Court required as a general rule that prisoners should have at least 3 sq. m. of personal space. The applicant had been guaranteed an average of 2 sq. m. under the legislation prior to 2006. The Ministry of Justice and the domestic courts had acknowledged that overcrowding in prisons represented a systemic problem. Hence, for approximately three years the applicant had lived in extremely cramped conditions, with an area of personal space falling below the European standard. The Court noted that, in the meantime, the standard for personal space in communal cells in Romania had been increased to 4 sq. m. per prisoner.

(b) *Other factors* – The lack of space of which the applicant complained appeared to have been aggravated by the fact that he had been confined for twenty-three hours a day to a cell which was used for both sleeping and eating, in deplorable conditions of hygiene. As to the fact that he had to share a cell and a hospital ward with prisoners who smoked, no consensus existed among the member States of the Council of Europe with regard to protection against passive smoking in prisons. The fact remained that the applicant, unlike the applicants in some other cases, had never had an individual cell and had had to tolerate his fellow prisoners' smoking even in the prison infirmary and the prison hospital, against his doctor's advice. However, a law in force since June 2002 prohibited smoking in hospitals and the domestic courts had frequently ruled that smokers and non-smokers should be detained separately. It followed that the conditions of detention to which the applicant had been subjected had exceeded the threshold of severity required by Article 3.

Conclusion: violation (unanimously).

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

Degrading treatment

Living conditions in a social care home for persons with mental disorders: *relinquishment in favour of the Grand Chamber*

Stanev v. Bulgaria - 36760/06
[Section V]

(See Article 5 § 1 below, page 14)

Failure of domestic courts to give sufficient weight to medical advice that prisoner should be admitted to a specialist clinic: *violation*

Xiros v. Greece - 1033/07
Judgment 9.9.2010 [Section I]

Facts – In 2002 the applicant was seriously injured when a bomb exploded in his hands during preparations for an attack. After being treated in intensive care in hospital, he was remanded in custody. In December 2003 an assize court sentenced him to, among other things, life imprisonment for membership of a terrorist group and participation in its criminal activities. The applicant lodged a number of unsuccessful appeals against his detention, on grounds of health problems related to the various and serious consequences of the explosion.

Law – Article 3: The applicant's health made it difficult for him to perform everyday tasks. However, at no point during his detention had the doctors attending him suggested that he was unfit to serve his sentence. They had simply recommended a stay of execution of the sentence so that he could receive systematic hospital treatment for the length of time required. Hence, the applicant's situation did not fall into the category of exceptional cases in which a prisoner's state of health was wholly incompatible with his continued detention.

The applicant had received appropriate treatment carried out by specialist medical personnel in a medical setting. However, during his detention several specialists had stressed the need for him to be admitted to a specialist eye clinic for systematic

and continuous medical supervision. Despite this, the criminal court had rejected the applicant's application for a stay of execution. Without giving explicit reasons for its choice, it based its decision on the fact that the doctor who attended him regularly had at no point recommended systematic hospital treatment, rather than on the firm opinion to the contrary given by three other doctors. If the domestic court had not wished to endorse the findings of the doctors who recommended systematic hospital treatment, however, it would have been preferable for it to request a further expert medical opinion on that controversial point instead of taking a decision itself on an essentially medical issue which was central to the treatment of the applicant's health problems. The criminal court had also based its decision on the finding that the applicant's conditions of detention were virtually equivalent to hospital conditions, although this was not borne out by the evidence in the case file. Lastly, the foregoing considerations had to be seen in the context of the indisputably serious and worsening state of health of the applicant throughout his detention. Thus, the various medical reports advocating that he receive systematic treatment in a specialist clinic should have been considered more closely by the competent judicial authorities. Furthermore, in view of the very poor standard of medical care available from the prison clinic, there were doubts as to the capacity of its permanent staff to deal with an emergency. In the circumstances, the competent authorities had not done what could reasonably be expected of them in order to comply with Article 3.

The adaptation of the conditions of detention to prisoners' individual needs was of particular relevance in the present case in view of the applicant's major physical disabilities, which seriously affected his sensory capacities and movement, and the fact that he was serving a life sentence, which meant that, normally speaking, he would be subjected to his current conditions of detention for the rest of his life. The applicant's overall conditions of detention were not open to criticism and were not contrary to Article 3. Although he was alone in his cell without assistance in performing everyday tasks, he had not to date requested permission from the prison authorities to share his cell with another prisoner or to be assisted by a carer. Thus, the prison authorities could not be held responsible for the fact that he was alone in his cell without assistance in the performance of his daily tasks.

The prison authorities had therefore demonstrated their willingness to provide the applicant with treatment by specialised medical personnel in a medical setting. However, the competent judicial authorities had not given sufficient consideration to the reports issued by the three doctors who had recommended that the applicant be admitted to a specialist clinic for the time required by the nature of his treatment. This factor, combined with the seriousness of his condition and the inadequate standard of treatment provided by the prison clinic, was sufficient basis for finding that he had been subjected to degrading treatment within the meaning of Article 3.

Conclusion: violation (by four votes to three).

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

Expulsion

Alleged risk of female genital mutilation if applicant returned to Nigeria: *communicated*

Omeredo v. Austria - 8969/10
[Section I]

The applicant fled Nigeria in May 2003 and applied for asylum in Austria on the grounds that she was at risk of female genital mutilation (FGM) in her own country. The Federal Asylum Office rejected her request after finding that, even though her statements were credible, she had the alternative of living in another province of Nigeria where FGM was prohibited by law. The applicant lodged a complaint against that decision with the asylum court, but it was ultimately rejected. The Constitutional Court declined to examine the question after finding that it did not raise any issue of constitutional law. In her application to the European Court, the applicant complains under Article 3 of the Convention that she runs the risk of being subjected to FGM if expelled to Nigeria and that relying on an internal flight alternative and moving to another part of Nigeria as a single woman without her family to help her would also amount to a situation in violation of her rights under that provision.

Communicated under Article 3.

Extradition

Unlawful removal of a Tajik opposition leader to Tajikistan without assessing risks of ill-treatment: *violation*

Iskandarov v. Russia - 17185/05
Judgment 23.9.2010 [Section I]

Facts – The applicant, one of the Tajik opposition leaders, was charged, in Tajikistan and in his absence, with terrorism and various other offences and placed on an international "wanted" list. In December 2004 the Russian Prosecutor General received a request for his extradition. The applicant was arrested, but his extradition was refused in view of his pending asylum application. He was released on 4 April 2005 and thereafter stayed with a friend in the Moscow region. According to the applicant, while taking a walk in the evening of 15 April 2005, he was apprehended by several men wearing traffic-police uniforms who handcuffed him, placed him in a car and drove off. He was detained and beaten overnight in an unknown location. He heard his abductors speak in unaccented Russian to other men, who he concluded were Russian law-enforcement officers. He was taken, blindfolded, to an airport, where he was put on a plane without his identity papers being checked. Once on board he did not hear any of the instructions or other information that was usually conveyed on a civil aircraft. After landing at Dushanbe airport (Tajikistan) he was handed over to the Tajik law-enforcement agencies. He was held under a false name for the first ten days after his arrival, during which time he says he was regularly beaten, kept in a tiny, dirty cell, not allowed to go for walks or to wash, and hardly fed at all. He made a self-incriminating statement under threat of losing his life. In October 2005 he was sentenced to twenty-three years in prison. He subsequently sent numerous complaints to the Russian authorities related to his unlawful detention and transfer to Tajikistan, all of which either remained unanswered or were dismissed.

Law – Establishment of the facts: The applicant had provided a generally clear and coherent description of his removal from Russia to Tajikistan. His allegation that he had been unlawfully extradited by the Russian authorities had been supported by the reports of the US Department of State. The Russian Government had provided no explanation about how, after last being seen in the Moscow region in the evening of 15 April 2005, he had ended up in a Tajik prison two days later. Given that the shortest route by road between Korolev and Dushanbe was 3,660 kilometres long and passed through two sovereign States with their own border controls – Kazakhstan and Uzbekistan – the suggestion that the applicant could have been transferred to Tajikistan other than by aircraft was implausible. The applicant's allegation that he had been boarded on a plane by Russian agents who were allowed to cross the border without complying with the regular formalities appeared credible. The Government had not produced any border or customs registration logs showing where and when the applicant had left Russian territory. Nor had they provided any plausible explanation as to how the applicant could have arrived in Dushanbe unless accompanied by Russian officials. The Court accordingly found it established that on 15 April 2005 the applicant had been arrested by Russian State agents and had remained under their control until his transfer to the Tajik authorities.

Article 3: The Court first considered the general political climate in Tajikistan at the material time on the basis of evidence from a number of objective sources. It found that the overall human-rights situation, including the treatment of detainees, had given rise to serious concerns. In particular, reports had showed that torture by State officials was common and that perpetrators enjoyed immunity. Prison conditions were harsh, even life-threatening, and a number of prisoners had died of hunger. As regards the applicant's personal situation, the Court noted that he had been a possible challenger to the Tajik President in the presidential race. At the time he was removed from Russian territory, reports showed that another prominent opposition leader critical of the regime had been ill-treated. Consequently, the special distinguishing features of his profile and situation should have enabled the Russian authorities to foresee that the applicant might be ill-treated in Tajikistan. As no order had been made for his extradition, he had not been able to appeal to a court against his removal. Accordingly, his removal to Tajikistan had been in breach of the obligation of the Russian authorities to protect him against risks of ill-treatment.

Conclusion: violation (unanimously).

Article 5 § 1: The applicant's situation while under the control of Russian State agents following his abduction on 15 April 2005 had amounted in practice to a deprivation of liberty. Article 5 § 1 was therefore applicable. The Court found the use of opaque methods by State agents deeply regrettable. The applicant's detention had not been on the basis of a decision issued in accordance with national law but was in pursuance of an unlawful removal designed to circumvent the dismissal of the extradition request. It had not been acknowledged or logged in any arrest or detention records and had thus constituted a complete negation of the right to liberty and security of person.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage.

Article 46: The applicant had requested that the respondent Government should be required to ensure his release from the Tajik prison and his return to the Russian Federation. Given that the individual measure sought by the applicant would require the respondent Government to interfere with the internal affairs of a sovereign State, the Court did not find it appropriate to indicate any individual measures to be adopted in order to redress the violations found.

ARTICLE 4

Forced labour

Obligation on medical practitioner to participate in emergency-service scheme: *inadmissible*

Steindel v. Germany - 29878/07
Decision 14.9.2010 [Section V]

Facts – The applicant is an ophthalmologist in private practice. In his application to the Court, he complained that he was under a statutory obligation to participate in an emergency-service scheme organised by a public body, the Association of Statutory Health Insurance Physicians, despite the fact that he was not a member of that body and did not practice under the public-health insurance scheme. Under the scheme, medical practitioners are required to spend six days out of every three months on emergency duties. Failure to discharge their obligations can lead to disciplinary action. Participants are remunerated for their work and released from the obligation to provide a round-the-clock service to their patients.

Law – Article 4: The provisions of Article 4 § 3 (d), which exclude "any work or service which forms part of normal civil obligations" from the scope of forced or compulsory labour, was of special significance in the applicant's case. The services to be rendered under the emergency scheme did not fall outside the ambit of a physician's normal professional activities and usual work. They were remunerated and, in principle, released the practitioner from the obligation to be available for his patients outside consultation hours (although the applicant chose not to make use of that option). The obligation was part of a scheme that had been devised to unburden all practising physicians from the duty to be available at nights and on weekends while at the same time ensuring the provision of medical services at such times. It was thus founded on a concept of professional and civil solidarity aimed at averting emergencies. Finally, the burden of six days' service over a three-month period imposed on the applicant was not disproportionate. The services the applicant was required to perform did not, therefore, amount to "compulsory or forced labour".

Conclusion: inadmissible (manifestly ill-founded).

The Court also dismissed as being manifestly ill-founded the applicant's complaints under Article 14, in conjunction with Article 4, and under Article 1 of Protocol No. 1.

ARTICLE 5

Article 5 § 1

Liberty of person
Deprivation of liberty

Refusal on account of UN sanctions to allow person living in Italian enclave to pass through Swiss territory: *relinquishment in favour of the Grand Chamber*

Nada v. Switzerland - 10593/08
[Section I]

On 2 October 2000, in accordance with Resolutions 1267 (1999) and 1333 (2000) of the United Nations Security Council, the Swiss Federal Council adopted an order laying down measures against individuals and entities associated with Osama bin Laden, al-Qaeda or the Taliban. The order provided for the freezing of assets and financial resources of those concerned, and prohibited the provision to them of funds or other resources. It further prohibited their entry into or transit through Switzerland. In November 2001 the names of Mr Nada, an Italian national living in Campione d'Italia, an Italian enclave of 1.6 square kilometres inside the Swiss Canton of Tessin, and a number of organisations associated with him, were added by the Swiss authorities to the list of persons concerned by the prohibitions. After being refused authorisation to enter or pass through Switzerland by the Federal Office of Migration, in March 2004, the applicant requested that his name be deleted from the list, pointing out that the police investigation concerning him had been discontinued. However, his request was rejected and

he lodged an administrative appeal with the domestic courts. Ruling in the last instance in November 2007, the Federal Court dismissed his appeal, considering mainly that the sanctions decided by the Security Council did not deprive the persons concerned of means of subsistence and did not constitute deprivation of liberty, since they could still move freely within their country of residence. Moreover, Switzerland was bound by the Security Council's decisions and had no discretion in the implementation of the sanctions imposed. In this connection the Federal Court observed that the persons concerned by the sanctions had been placed on a list which was maintained and updated by the United Nations Sanctions Committee and that the Member States were not authorised to remove any names on their own initiative. However, since the prohibition on entry into or transit through Switzerland was tantamount to house arrest and constituted a serious restriction on the applicant's physical freedom of movement, the Federal Court held that the Swiss authorities were required to exhaust all measures of exemption authorised by the Security Council resolutions. The applicant alleges that the Federal Office of Migration refused several times in 2008 to let him enter or pass through Switzerland.

Before the European Court, the applicant complains in particular that the prohibition on entry into or transit through Switzerland restricts his physical freedom and the exercise of his private and family life.

The application was communicated to the respondent Government on 12 March 2009 under Articles 5, 8 and 13.

Liberty of person

Unacknowledged detention and unlawful removal designed to circumvent extradition procedures: *violation*

Iskandarov v. Russia - 17185/05
Judgment 23.9.2010 [Section I]

(See Article 3 above, page 11)

Deprivation of liberty
Lawful arrest or detention

Lawfulness of placement in a social care home for persons with mental disorders: *relinquishment in favour of the Grand Chamber*

Stanev v. Bulgaria - 36760/06
[Section V]

In 2000, on an application by two of the applicant's relatives, a court declared him to be partially lacking legal capacity on the ground that he was suffering from schizophrenia. He was subsequently placed under trusteeship and admitted against his will to a social care home for adults with mental disorders. According to the applicant, the home was decaying, dirty and rarely heated in winter, the sanitary facilities were unhygienic and the food was insufficient and of poor quality. In 2004 and 2005, through his lawyer, he asked the public prosecutor and the mayor to institute legal proceedings for the discontinuation of his trusteeship, but no action was taken. His trustee likewise refused to bring such proceedings, on the ground that the institution was the most appropriate place for the applicant to live as he did not have the means to lead an autonomous existence. In 2006, at his lawyer's request, the applicant was examined by an independent psychiatrist, who concluded that he did not display all the symptoms associated with schizophrenia, that he was capable of reintegrating into society and that living in the social care home was very destructive for his health.

Before the Court, the applicant relies on Article 5 §§ 1, 4 and 5 (as regards his placement in the home), Articles 3 and 13 (as regards the living conditions there), Article 6 (lack of access to a court to apply for release from trusteeship), and Articles 8 and 13 (as regards the restrictions resulting from the trusteeship system, including his admission to the home) of the Convention. His application was declared admissible in a Chamber decision of 29 June 2010, the questions of the applicability of Article 5 and the exhaustion of domestic remedies being joined to the examination of the merits.

Article 5 § 3

Release pending trial
Guarantees to appear for trial

Level of recognizance required to secure release on bail of a ship's master in maritime pollution case: *no violation*

Mangouras v. Spain - 12050/04
Judgment 28.9.2010 [GC]

Facts – The applicant, a Greek national, was the Master of the ship *Prestige*, which in 2002, while

sailing off the Spanish coast, spilled the 70,000 tonnes of fuel oil it was carrying into the Atlantic Ocean after its hull sprang a leak. The spillage of the cargo caused an ecological disaster whose effects on marine flora and fauna lasted for several months and spread as far as the French coast.

A criminal investigation was opened and the investigating judge remanded the applicant in custody with the possibility of release on bail of EUR 3,000,000. The judge stressed the applicant's conduct, which could constitute an offence of causing damage to natural resources and the environment and one of failing to comply with the instructions of the administrative authorities. In the judge's view, the seriousness of the alleged offences and the fact that the applicant was a foreign national who had no particular ties with Spain justified the high sum set for bail. The applicant requested his release and, in the alternative, the reduction of bail to EUR 60,000 to reflect his personal situation. The investigating judge in question refused the request on the ground that the seriousness of the alleged offences justified the applicant's continued pre-trial detention. As to the amount set for bail, he reiterated the previous arguments and added that the applicant's appearance at trial was vital in order to elucidate the sequence of events following the leak in the vessel's hull. The applicant lodged an appeal and an application to have the ruling set aside, both of which were dismissed. The investigating judge recorded the lodging of a bank guarantee in an amount corresponding to the sum set for bail, whereupon he ordered the applicant's provisional release, subject to certain conditions. The *amparo* appeal which the applicant lodged with the Constitutional Court, complaining of the amount set for bail, was declared inadmissible.

The Spanish authorities subsequently authorised the applicant's return to his country of origin, where he is now living, on condition that the Greek authorities enforced compliance with the periodic controls to which the applicant had been subject in Spain. As a result, he must report every two weeks to a police station on the island where he was born or in Athens. The criminal proceedings on the merits are still pending.

In a judgment of 8 January 2009 a Chamber of the Court held unanimously that there had been no violation of Article 5 § 3 (see Information Note no. 115).

Law – Article 5 § 3: The Court reiterated that bail could only be required as long as reasons justifying detention prevailed, and that the authorities had to take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention was indispensable. Furthermore, while the amount of bail had to be assessed principally by reference to the accused and his assets it was not unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him. The applicant had been deprived of his liberty for 83 days and had been released following the lodging of a bank guarantee of EUR 3,000,000. While the sum set for bail most likely exceeded the applicant's own capacity to pay, the domestic courts had sought to take into account, in addition to the applicant's personal situation, the seriousness of the offence of which he was accused and also his "professional environment". The Court therefore had to ascertain whether that approach was compatible with Article 5 § 3.

The Court was of the view that new realities had to be taken into account in interpreting the requirements of Article 5 § 3, namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences, and the trend towards using criminal law as a means of enforcing the environmental obligations imposed by European and international law. As the increasingly high standard being required in the area of the protection of human rights correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies, it could not be ruled out that the professional environment which formed the setting for the activity in question should be taken into consideration in determining the amount of bail, in order to ensure that the measure was effective. Given the exceptional nature of the present case and the huge environmental damage caused by marine pollution on a seldom-seen scale, it was hardly surprising that the judicial authorities should have adjusted the amount required by way of bail in line with the level of liability incurred, so as to ensure that those responsible had no incentive to evade justice and forfeit the security. It was by no means certain that a level of bail set solely by reference to the applicant's assets would have been sufficient to ensure his attendance at the hearing. In addition, the very fact that payment had been made by the shipowner's insurer appeared to confirm that the Spanish courts, when they had referred to the applicant's "professional environment", had been correct in finding – implicitly – that a relationship existed between the applicant and the persons who were to provide the security.

The Spanish courts had therefore taken sufficient account of the applicant's personal situation, and

in particular his status as an employee of the ship's owner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain and his age. In view of the particular context of the case and the disastrous environmental and economic consequences of the oil spill, the authorities had been justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant.

Conclusion: no violation (by ten votes to seven).

Article 5 § 4

Review of lawfulness of detention
Procedural guarantees of review

Refusal to allow a convicted prisoner to be assisted by lawyer of his own choosing in order to appeal against preventive detention: *inadmissible*

Prehn v. Germany - 40451/06
Decision 24.8.2010 [Section V]

Facts – In 1996 a regional court sentenced the applicant to ten years' imprisonment for rape and ordered his preventive detention. In 2005 the applicant requested the court to suspend the remainder of his sentence and his preventive detention on probation. Although he already had representation, the applicant requested the court to appoint another counsel, who he said was specialised in the execution of sentences and sexual offences. His request was dismissed as the counsel in question was practising in another city and so was not within the court's judicial district. In 2006, having regard to a psychiatric report, the court ordered that the applicant be placed in preventive detention. The applicant complained that he had not been allowed to defend himself effectively by legal assistance of his own choosing.

Law – Article 5 § 4: Preventive detention was ordered if the offender was considered at risk of recidivism and therefore still a danger to the public. However, the factor of dangerousness was susceptible to change over the passage of time and new issues of lawfulness might thus arise in the course of the offender's detention. The applicant in the instant case had therefore been entitled to have the lawfulness of his preventive detention decided by a court at reasonable intervals. Under the Court's case-law on Article 6 § 3 (c), the right of an accused to be defended by counsel "of his own choosing" was not an absolute one and could be subject to limitations necessary in the interests of justice. These principles applied, *mutatis mutandis*, to the right to receive legal assistance in proceedings covered by Article 5 § 4. The main reason why the domestic courts had refused to appoint the counsel chosen by the applicant was that he was not practising within the court's jurisdiction. The Court accepted that the proximity of counsel to his client and the court facilitated proper defence and communication and kept costs down. The domestic courts were entitled within their margin of appreciation to take into account the fact that counsel resided more than 100 kilometres from the court and the prison where the applicant was detained, as also the limited availability of modern means of communication. Moreover, the interests of justice required the decision on the applicant's placement in preventive detention to be taken speedily. Furthermore, according to the findings of the domestic courts, there had been no firm relationship of trust between the applicant and the counsel concerned, who had never previously defended or met him in person. Nor had there been any evidence to suggest that the counsel already acting for the applicant was unable to provide him with effective legal assistance. The Court was therefore satisfied that there had been relevant and sufficient grounds for the domestic courts not to appoint the counsel chosen by the applicant and that the applicant's right to receive legal assistance comprised in the right under Article 5 § 4 to a fair, adversarial procedure had not been disregarded.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 5

Compensation

Refusal to grant reparation for unlawful detention on grounds that applicant had not proved any non-pecuniary damage: *violation*

Danev v. Bulgaria - 9411/05
Judgment 2.9.2010 [Section V]

Facts – In 1997 the applicant was charged with unlawful possession of firearms and remanded in custody. In the following weeks he was released for

lack of evidence and the proceedings were discontinued. The applicant brought an action against the public prosecutor's office and the investigation service for compensation for the damage sustained as a result of his detention. He complained that the detention had been unlawful, and that his solitary confinement and the poor detention conditions had caused him anxiety. The district court awarded compensation to the applicant, who found the award too low and appealed. The appellate court acknowledged that the applicant's detention had been unlawful but dismissed his claim for compensation on the ground that he had not proved that he had suffered any non-pecuniary damage.

Law – Article 5 § 5: Although the applicant had obtained an acknowledgment that his detention had been unlawful and an implicit admission of a violation of Article 5 § 1 (c) of the Convention, he had nevertheless not received any compensation because he had not proved that he had suffered any non-pecuniary damage. The appellate court seemed to have assumed that any non-pecuniary damage should be outwardly perceptible and that the adverse effects of unlawful detention ended upon release. The cumulative application of those two principles had effectively imposed an obligation on the applicant to prove that his allegations were founded by adducing evidence of outward signs of his suffering during his detention. Thus, the appellate court had disregarded statements by a witness confirming the difficulties faced by the applicant because they had concerned his condition after his release and were not corroborated by any other evidence. The Court, however, considered that such effects on a person's psychological well-being could persist even after his release. Moreover, the appellate court had not taken into consideration the finding of a violation of the applicant's right to liberty and security or his arguments as to his fragile psychological condition while in detention in establishing whether there had been any non-pecuniary damage. That formalistic approach meant that the award of any compensation was unlikely in the large number of cases where an unlawful detention lasted a short time and did not result in an objectively perceptible deterioration in the detainee's physical or psychological condition. Lastly, the applicant did not appear to have had any other remedy available for obtaining compensation.

Conclusion: violation (unanimously).

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

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Alleged lack of access to court for a physically disabled person: *inadmissible*

Farcaş v. Romania - 32596/04
Decision 14.9.2010 [Section III]

Facts – The case concerned the physical impossibility for the applicant, who has been disabled since the age of ten, to access certain public buildings in the city where he lives. Until 2004 he worked as an electronics repairman in a telecommunications workshop but, following his transfer to a new post that would have required him to carry out external work for which he was unsuited, he was obliged to accept a negotiated termination. He claimed that he had not been able to challenge the termination of his contract before the domestic courts because, since the entrance to the local court building was not specially adapted, he could not enter the court or seek assistance from the bar association. For similar reasons, he had not been able to claim unemployment benefit or challenge a refusal to grant him a personal assistant and contest the amount of a disability pension. More generally, the applicant complained before the European Court of the major difficulties he had encountered in establishing relationships with the outside world and in his personal development, in particular as he was not able to use public transport or the city's public buildings which had no special access facilities for persons with reduced mobility.

Law – The Court took the view that the applicant's claims could be best examined under Article 6 § 1 and Article 8, alone or in conjunction with Article 14. In addition, it decided to examine of its own motion the question whether Article 34, alone or in conjunction with Article 14, had been complied with, in view of the alleged impossibility for the applicant to challenge the decisions concerning his civil rights and thus to exhaust domestic remedies, because he had been unable to access the premises of the domestic courts, contact a lawyer or use postal services.

Articles 6 § 1 and 34, alone or in conjunction with Article 14: The applicant had complained that it had been impossible for him to bring legal proceedings to challenge the decision to discontinue

his professional activity, the refusal to grant him a personal assistant and the amount of his disability pension. Those challenges had direct implications for his civil rights and obligations within the meaning of Article 6 § 1, which was therefore applicable. The Court reiterated that hindrance in fact could contravene the Convention just like a legal impediment and that limitation of access to a court could not go as far as interfering with an individual's entitlement to a fair hearing. Article 34 could also come into play if it transpired that the applicant had not been able to exhaust domestic remedies, consult a lawyer to prepare his defence before the domestic courts or communicate freely with the Court, because no specific measures had been taken to enable persons with reduced mobility to use public postal services. In this connection, positive measures could be expected from the State under Article 34.

In the present case, the Court concluded that neither the right of access to a court nor the right of individual petition had been hindered by insurmountable obstacles preventing the applicant from bringing proceedings or from lodging an application or communicating with the Court. He could have brought proceedings before the courts or the administrative authorities by post, if necessary through an intermediary. The local post-office was accessible and, in any event, access to it was not indispensible for posting letters. The assistance of a lawyer was not necessary to bring the proceedings in question, and the applicant could always have contacted the bar association by letter or fax, or could have made a request to the court for free legal assistance. Lastly, no appearance of discriminatory treatment against the applicant had been noted.

Conclusion: inadmissible (manifestly ill-founded).

Article 8, taken alone or in conjunction with Article 14: The Court rejected, for non-exhaustion of domestic remedies, the part of the complaint that concerned the decisions of the applicant's employer and the administrative authorities. As regards the alleged failure of the authorities to take measures to enable the applicant to access certain public buildings and to travel around the town, the Court reiterated that Article 8 did not apply each and every time the daily life of a person alleging lack of access to public institutions was in issue, but only in cases where a lack of such access prevented an individual from exercising his right to personal development and his right to establish and develop relationships with other human beings and the outside world. In those circumstances, the State could be expected to take measures to guarantee access to such institutions. However, in view of the general nature of the applicant's allegations, there remained some doubt about his daily use of those institutions and about the direct and immediate connection between the measures required of the State and his private life. Moreover, the Court noted that the situation in the town where he was living had gradually improved over the past few years, with the adoption of new legislation that encouraged integration of the disabled. In addition, without underestimating the daily difficulties that he must have encountered, the Court pointed out that since 2004, shortly after he lodged his application, the applicant had been granted a personal assistant and received an allowance on that basis.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 6 § 1 (criminal)

Fair hearing

Police officer responsible for operating video equipment permitted to remain alone with jury while it viewed important video evidence: *no violation*

Szypusz v. the United Kingdom - 8400/07
Judgment 21.9.2010 [Section IV]

Facts – The applicant was charged with attempted murder and making threats to kill. An important part of the prosecution case against him involved video recordings from closed circuit television (CCTV) cameras operating near the crime scene. A compilation of the CCTV footage was played a number of times during the trial on sophisticated digital equipment. The machine was operated by a detective constable who, as a member of the investigating team, was, formally speaking, a witness in the case. After retiring, the jury indicated that they wished to review the video evidence. The judge consulted counsel for the defendants, including junior counsel for the applicant, but they did not oppose the showing of the video recordings. The judge instructed the members of the jury not to communicate with the police officer who would be handling the video equipment other than for the purposes of asking him to play certain parts of

the footage. The jury was left alone in the court room with the police officer for almost two hours. At that point leading counsel for the applicant sought to reconvene the court to protest against the jury being left alone with the police officer. The applicant was ultimately found guilty and sentenced to twenty-five years' imprisonment. His appeal alleging bias on the part of the jury was dismissed by the Court of Appeal.

Law – Article 6 § 1: Regardless of the extent of his actual role in the prosecution of the case, the police officer's presence alone with the jury could have given rise to understandable misgivings on the part of the accused about the jury's impartiality. However, after being selected to serve, the jurors had been required to swear an oath to the effect that they would faithfully try the applicant and give a true verdict according to the evidence presented in court. They had also been given clear instructions not to discuss the case with any outside person. In addition, when deciding to allow the jury to review the CCTV footage with the assistance of the police officer, the trial judge had emphasised to the jurors that the officer was only to operate the video machine and that there was to be no communication with him other than to request him to play certain parts of the footage. It was therefore the jury which had decided which parts of the footage it wished to view and the police officer had had no influence in that respect. Furthermore, although the jurors had also been instructed to bring any concerns regarding fellow jurors to the trial judge's attention, none had expressed any concern following the viewing of the CCTV footage. Moreover, defence counsel for two of the defendants had expressly agreed to the viewing in the manner proposed and junior counsel for the applicant had not objected. Finally, although the Court of Appeal had suggested that the approach adopted in the applicant's case was not to be followed in future cases, the Court considered that from time to time appellate courts were allowed to provide guidance to first-instance courts in order to avoid procedural flaws which, while not undermining the overall fairness of the trial, were undesirable. The fact that the course of action adopted in the applicant's case had ultimately been criticised did not in itself suggest that his rights under Article 6 had been breached. In sum, there had been sufficient safeguards in place to exclude any objectively justified or legitimate doubts as to the impartiality of the jury.

Conclusion: no violation (five votes to two).

ARTICLE 8

Private life

Restrictions resulting from the trusteeship system: *relinquishment in favour of the Grand Chamber*

Stanev v. Bulgaria - 36760/06
[Section V]

(See Article 5 § 1 above, page 14)

GPS surveillance of suspected terrorist: *no violation*

Uzun v. Germany - 35623/05
Judgment 2.9.2010 [Section V]

Facts – In October 1995 the applicant and another man (S.) were placed under surveillance on the orders of an investigating judge because of their suspected involvement in bomb attacks that had been carried out by an extreme left-wing group to which they belonged. Realising that they were under surveillance, the two men sought to escape detection by destroying transmitters that had been installed in S.'s car and by avoiding use of the telephone. To counteract this, in December 1995 the Federal Public Prosecutor General authorised their surveillance by a Global-Positioning System device (GPS) which the authorities arranged to be fitted in S.'s car. The applicant and S. were arrested in February 1996 and subsequently found guilty of various bomb attacks between January and December 1995 on the basis of the evidence obtained through their surveillance, including GPS evidence linking the location of S.'s car to the scene of one of the attacks. The applicant was given a thirteen-year prison sentence. His appeals to the Federal Court of Justice and the Federal Constitutional Court were dismissed, with the latter court holding, *inter alia*, that the interference with his right to privacy by GPS surveillance had been proportionate in view of the gravity of the offences and the fact that he had evaded other measures of surveillance.

Law – Article 8: Although installed in a car belonging to a third party (S.), the GPS receiver had clearly been intended to obtain information on the applicant also, as the authorities had been aware from their previous investigations that the two men were using the car together. The applicant

therefore had victim status. Further, the GPS surveillance in the applicant's case had been used to systematically collect and store data on his whereabouts and movements over a three-month period. That data had in turn enabled the authorities to draw up a pattern of his movements, conduct additional investigations and collect further evidence that had been used at his trial. Accordingly, the GPS surveillance and the processing and use of the data thereby obtained had interfered with the applicant's right to respect for his private life.

As to whether the interference was in accordance with the law, the surveillance had a basis in a statutory provision[1] that was accessible to the applicant. The questions whether that provision was sufficiently precise to satisfy the foreseeability requirement and whether it afforded adequate safeguards against abuse were not to be judged by reference to the rather strict standards that applied in the context of surveillance by telecommunications[2], as GPS surveillance of movements in public places was less intrusive.

The domestic courts' ruling that the provision in question (which permitted the use of photographs and visual recordings and "other special technical means" of surveillance in respect of criminal offences of "considerable gravity") covered GPS surveillance constituted a reasonably foreseeable development and clarification of the law by judicial interpretation. The Court also considered that adequate and effective safeguards against abuse had been in place. In that connection, it noted, firstly, that GPS surveillance could only be used in respect of offences of considerable gravity where other methods had less prospect of success or were more difficult; secondly, the absence of a fixed statutory limit on the duration of the surveillance had been remedied by the domestic courts' review of the proportionality of the measure; thirdly, it had not been necessary for the legislation to require prior authorisation of the surveillance by an independent body as the criminal courts' power to conduct an *ex post facto* review of the legality of such surveillance (and to exclude evidence obtained unlawfully) had provided sufficient protection against arbitrariness; and, lastly, the domestic courts' application of the proportionality principle had provided sufficient protection against the applicant becoming subject to total surveillance as a result of an accumulation of uncoordinated measures being taken by different authorities. The interference with the applicant's right to respect for his private life had thus been in accordance with the law.

It had pursued the legitimate aims of protecting national security, public safety and the rights of the victims, and of preventing crime. It had also been proportionate: GPS surveillance had been ordered only after less intrusive methods of investigation had proved insufficient, had been carried out for a relatively short period (some three months), and had affected the applicant only when he was travelling in his accomplice's car. The applicant could not be said to have been subjected to total and comprehensive surveillance. Given that the investigation had concerned very serious crimes, the applicant's surveillance by GPS had thus been necessary in a democratic society. In view of that finding, no separate issue arose under Article 6 § 1.

Conclusion: no violation (unanimously).

Press article accusing wife of senior judge on basis of remarks by former accountant of involvement in improper dealings with a company: *no violation*

Polanco Torres and Movilla Polanco v. Spain
- 34147/06
Judgment 21.9.2010 [Section III]

Facts – The applicants are respectively the wife and daughter of a senior judge who has died since the events of the case. He was president of a court before which criminal proceedings had been brought against a senior political leader of the region. In 1994 an article in a national daily newspaper, based on a company's accounts, accused the judge's wife of involvement in unlawful dealings with that company. The judge and his wife brought proceedings for the protection of their honour against the national newspaper. The district court partly upheld their application and ordered the newspaper to pay them damages. The appellate court and the Supreme Court upheld that judgment. In 2006, however, the Constitutional Court upheld an *amparo* appeal lodged by the newspaper and quashed the judgments of the courts below.

1. Article 100c § 1 no. 1 (b) of the Code of Criminal Procedure.

2. See, for instance, *Weber and Saravia v. Germany* (dec.) (no. 54934/00, 29 June 2006, Information Note no. 88), *Liberty and Others v. the United Kingdom* (no. 58243/00, 1 July 2008, Information Note no. 110) and *Kennedy v. the United Kingdom* (no. 26839/05, 18 May 2010, Information Note no. 130).

Law – Article 8: Article 8 was applicable because the allegations in the newspaper article were serious enough to impugn the personal integrity of the persons concerned. The article concerned a subject of general interest for its Spanish readers, as one of the applicants was referred to as the wife of a senior judge, who was precisely identified, and in her denial she mentioned a "manoeuvre" by the highest political leader in the region. The article had the characteristics of a neutral report, containing on the one hand the statements of the former accountant and on the other a denial by the judge's wife. The author of the article had made use of the effective possibility of verifying the information by contacting the company's former accountant. Moreover, before publishing the article, he had contacted the judge's wife to give her the opportunity to comment on the information at issue. As the Constitutional Court had rightly observed, that showed that the journalist had fulfilled his obligation of diligence. In addition, the publication of an article could not be prevented simply because the persons concerned denied the allegations therein. As to whether the sources had been reliable, as the Constitutional Court had found, the accountant's dismissal and the criminal proceedings against him had not called into question the reliability of his statements, and the question of the lawfulness of the means by which the information had been obtained was not relevant in determining whether the honour of the persons concerned had been damaged. Accordingly, it had been reasonable for the journalist to rely on the sources at his disposal and he had taken sufficient measures to verify the allegations contained in his article. The Constitutional Court had put forward sufficient grounds in finding that the national newspaper's right to impart information had to be given more weight than the applicants' right to the protection of their reputation. Accordingly, there was no reason to conclude, in the balancing of the competing interests, that the Constitutional Court had overstepped its margin of appreciation.

Conclusion: no violation (six votes to one).

Private and family life

Dismissal of church employees for adultery: *no violation and violation*

Obst v. Germany - 425/03
Schüth v. Germany - 1620/03
Judgments 23.9.2010 [Section V]

Facts – In the case of *Obst* the applicant had grown up in the Mormon faith and married in 1980 in accordance with Mormon rites. After holding various positions in the Mormon Church, he was appointed to the post of director for Europe of the public relations department in 1986. In December 1993 he confided to his pastor that he had been having an affair with another woman. The pastor advised him to tell his superior, which he did. His superior dismissed him without notice a few days later for adultery.

In the case of *Schüth* the applicant had been the organist and choirmaster in a Catholic parish since the mid-1980s and until 1994, when he separated from his wife. Since 1995 he has been living with his new partner. In July 1997, after his children had told people in their kindergarten that their father was going to have another child, the dean of the parish discussed the matter with the applicant. A few days later the parish gave the applicant notice that he was being dismissed for adultery from April 1998.

The applicants brought proceedings in the labour courts, which found at final instance that the dismissals had been lawful.

Law – Article 8: In both cases the Court examined whether the balance struck by the labour courts – between the right to respect for private life guaranteed by Article 8 and the rights enjoyed by the Mormon and Catholic Churches under the Convention which safeguarded the autonomy of religious communities against unjustified State interference – had afforded the applicants sufficient protection. By putting in place a system of labour courts and a constitutional court having jurisdiction to review the former courts' decisions, the State had in principle complied with its positive obligations towards litigants in the area of employment law. The applicants had been able to bring their cases before a labour court with jurisdiction to determine whether the dismissal had been lawful under State labour law while having regard to ecclesiastical labour law. In both cases the Federal Labour Court had found that the requirement of marital fidelity, imposed by the Mormon Church and the Catholic Church respectively, did not conflict with the fundamental principles of the legal order.

In *Obst* the Federal Labour Court had pointed out that the only reason the Mormon Church had been able to base Mr Obst's dismissal on his adultery was because he had taken it upon himself to tell the Church about it. His dismissal had amounted to a necessary measure aimed at preserving the

Church's credibility, having regard in particular to the nature of his post and the importance of the duty of absolute fidelity to one's spouse. The courts had explained why the Church had not first been obliged to inflict a less severe penalty, such as a warning. According to the Labour Appeal Court, the injury Mr Obst had suffered as a result of his dismissal was limited, having regard, among other things, to his relatively young age. The labour courts had taken account of all the relevant factors and had carried out a detailed and meticulous balancing exercise of the interests at stake. The fact that the courts had given more weight to the interests of the Mormon Church than to those of Mr Obst did not raise an issue under the Convention. Their conclusion that Mr Obst had not been subject to unacceptable obligations did not appear unreasonable. Having grown up in the Mormon Church, he had – or should have – been aware, when signing the employment contract, of the importance of marital fidelity for his employer and of the incompatibility of his extra-marital relationship with the increased duties of loyalty he had contracted towards the Church as director for Europe of the public relations department. The duties of loyalty imposed on the applicant had been acceptable in that they had been aimed at preserving the credibility of the Mormon Church. The Labour Court of Appeal had clearly stated that its conclusions were not to be understood to imply that any act of adultery was in itself a ground justifying dismissal of a Church employee. In conclusion, having regard to the wider margin of appreciation of the State in the present case and in particular the fact that the labour courts had to strike a balance between several private interests, Article 8 of the Convention did not require the State to afford the applicant a higher degree of protection.

Conclusion: no violation (unanimously).

In *Schüth* the Court could not but observe the brevity of the labour courts' reasoning regarding the consequences they had drawn from the applicant's conduct. The Labour Court of Appeal had confined itself to stating that while his functions as organist and choirmaster did not fall within the regulations, that is, were not among those of the category of employees who had to be dismissed in the event of serious misconduct, they were nonetheless so closely bound up with the Catholic Church's proclamatory mission that the parish could not continue employing him without losing all credibility. The interests of the Church employer had been weighed not against the applicant's right to respect for his private and family life, but only against that of keeping his job. Moreover, under the wage tax card system, an employee was unable to conceal from his employer events relating to his civil status, for example divorce or the birth of a child. By qualifying the applicant's conduct as a serious breach within the meaning of the Basic Regulations, the labour courts had regarded the point of view of the Church employer as decisive without carrying out any further verification. A more detailed examination was required when weighing the competing rights and interests at stake, particularly as in this case the applicant's individual right had been balanced against a collective right. According to the Federal Constitutional Court, a Church could require its employees to observe a number of fundamental principles, but the employer-employee relationship based on civil law did not thereby acquire an ecclesiastical status. By signing his employment contract, the applicant had accepted a duty of loyalty towards the Catholic Church which had limited his right to respect for his private life to a certain degree; his signature could not be interpreted as an unequivocal personal undertaking to live a life of abstinence in the event of separation or divorce. The labour courts had given only marginal consideration to the fact that the applicant's case had not received media coverage that, after fourteen years of service for the parish, the applicant did not appear to have challenged the position of the Catholic Church but rather to have failed to observe it in practice and that the impugned conduct concerned the very heart of the applicant's private life. Lastly, the Labour Court of Appeal had merely stated that it had not disregarded the consequences of dismissal for the applicant without, however, specifying the factors it had taken into consideration. The fact that an employee who had been dismissed by a Church employer had limited opportunities of finding another job was of particular importance, particularly here, where the employee had special qualifications that would make it difficult for him to find a new job outside the Church. Accordingly, the labour courts had not sufficiently explained the reasons why, according to the conclusions of the Labour Court of Appeal, the interests of the parish far outweighed those of the applicant, and they had failed to weigh the rights of the applicant against those of the Church employer in a manner compatible with the Convention. Consequently, the State had not afforded the applicant the necessary protection.

Conclusion: violation (unanimously).

Refusal of domestic courts to order mother and child to undergo DNA tests to establish scientific evidence of paternity where that issue had already been judicially determined: *inadmissible*

I.L.V. v. Romania - 4901/04
Decision 24.8.2010 [Section III]

Facts – In 1988 the applicant had a relationship with L.C., who became pregnant. He was informed of her pregnancy in June 1988. In early October 1988 they decided to live together but separated after three weeks. In March 1989 L.C. gave birth to a daughter, A. In a final judgment of 1990 a district court upheld a claim by L.C. and recognised the applicant as the father of A. It based its decision mainly on the history of the couple's relationship and on the statutory conception period. In 2003 the applicant brought proceedings against L.C. and A. to oblige them to undergo blood and DNA tests. All his actions were dismissed by the courts.

Law – Article 8: (a) *Applicability* – The determination of the legal regime governing relations between a father and his putative child concerned the father's private life. Whilst, in the present case, the domestic courts had been confronted with a question of evidence, the applicant's aim had nevertheless been to ascertain the truth about an important aspect of his existence, namely whether or not he was the child's father. Consequently, Article 8 was applicable.

(b) *Merits* – The applicant had not appealed against the judgment of March 1990 establishing his paternity in respect of A. However, in 2003 he had brought an action before the domestic courts to oblige L.C. and A. to undergo a DNA test. That action had thus concerned an obligation to act, which was governed by the general rules applicable to civil actions. It had been dismissed by the court of appeal on the basis of the Constitution, which guaranteed every individual's right to self-determination. The dismissal of the proceedings had thus been provided for by law and had pursued the legitimate aim of protecting the rights and freedoms of others, in this case to safeguard the interests of A.

The balancing of the interests at stake had involved, on the one hand, the applicant's right to find out whether he was the biological father of A. and, on the other, the A. right of to retain her established parental relationship and the public interest in the protection of legal certainty. The applicant's legal action had been aimed at obtaining evidence in order to ascertain the biological reality of his relationship with A., by obliging her to undergo a DNA test. However, given the child's refusal to undergo the test, the interests at stake appeared contradictory. Moreover, the upholding of the applicant's action would have affected not only his own interests but also those of A. The emergence of DNA testing and the possibility of using it in legal proceedings had represented a significant development for the courts, enabling the existence of biological relationships between different individuals to be established with certainty. That being said, the need to protect third parties could exclude the possibility of obliging them to undergo a particular form of medical analysis, especially when, as in the present case, the third party in question was a child who had a long-established legitimate paternal relationship. The Court therefore found, as indeed the domestic courts had done, that at the material time it had not been unreasonable to place the child's best interests and the principle of legal certainty above the interests of the applicant.

Accordingly, the absence of any indication that the child wished to have her paternity verified, the fact that she was a minor, the length of time for which she had had a settled civil status and the possible pecuniary consequences, albeit minimal, all weighed in favour of upholding the child's interest in not being deprived of a legitimate biological paternity. Therefore, the reasons given by the court of appeal based on the child's interests had been sufficient to justify the rejection of the applicant's action. Since the applicant had no biological evidence to show that he was not A.'s father it was not for the Court to examine *in abstracto* whether the domestic law permitted the setting-aside of the final judgment of March 1990, against which the applicant had not appealed, in order to bring the legal reality into line with the biological reality.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 9

Freedom of religion

Refusal to grant association of Jehovah's Witnesses tax exemption available to liturgical associations: *admissible*

Association Les Témoins de Jéhovah v. France - 8916/05
Decision 21.9.2010 [Section V]

In a 1995 parliamentary report entitled "Sects in France", the Jehovah's Witnesses were classified as

a sect. The applicant association alleges that a number of steps were taken to marginalise it after the publication of that report. In particular, it was the subject of a tax audit, and on the basis of the information gathered, was issued with a formal notice to declare the donations it had received from 1993 to 1996. It refused and claimed the tax exemption applicable to donations and bequests to liturgical associations. An automatic taxation procedure was then instituted against it. In May 1998 it was served with a supplementary tax demand for the equivalent of approximately EUR 45 million. In January 1999 the applicant association filed an official objection with the tax authorities, but it was dismissed in September 1999 on the ground that to qualify for the tax exemption the association had to be recognised by the authorities concerned (the Ministry of the Interior or the Prefecture) as a religious movement or as having an exclusively liturgical purpose, which was not the case. The applicant association brought proceedings before the domestic courts but was unsuccessful. Before the European Court it argues that the tax proceedings against it infringes its freedom of religion (Article 9) and amounts to discrimination (Article 14).

Admissible under Article 9; remainder of application inadmissible (non-exhaustion of domestic remedies).

ARTICLE 10

Freedom of expression
Positive obligations

Failure of authorities to protect freedom of expression of a journalist who had commented on identity of Turkish citizens of Armenian extraction: *violation*

Dink v. Turkey - 2668/07 et al.
Judgment 14.9.2010 [Section II]

Facts – The applicants are a journalist, now deceased, and five of his close relatives. The first applicant, a Turkish national of Armenian extraction, was publication director and editor-in-chief of a Turkish-Armenian weekly newspaper. In 2003 and 2004 he wrote a series of articles for the newspaper in which he expressed his views on the identity of Turkish citizens of Armenian extraction. He commented, among other things, that Armenians' obsession with having their status as victims of genocide recognised had become their *raison d'être*, that this need on their part was treated with indifference by Turkish people and that, as a result, the traumas suffered by Armenians remained a live issue. In his view, the Turkish component in Armenian identity was both poison and antidote. He also wrote that "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia". He wrote a further article in which he referred to the Armenian origins of Atatürk's adopted daughter. Extreme nationalists reacted to the articles by staging demonstrations, writing threatening letters and lodging a criminal complaint. In 2005 a criminal court found the journalist guilty of denigrating "Turkishness" (Turkish identity) and imposed a suspended prison sentence on him. In 2006 the Court of Cassation upheld the finding of guilt. In early 2007 the criminal court to which the case had been remitted discontinued the proceedings on account of the death of the journalist, who had been assassinated a few weeks earlier. The public prosecutor's office instituted criminal proceedings against eighteen persons on suspicion of involvement in terrorist activities and assassinations; the proceedings are still pending. Several investigations and sets of proceedings aimed at establishing whether the gendarmerie and police departments in question had known about the assassination plot and had been negligent were discontinued, with the exception of one set of proceedings against two non-commissioned gendarmerie officers, still pending.

Article 2 (substantive aspect): In view of the reactions to the articles in question, the security forces could reasonably be considered to have been informed of the intense hostility towards the journalist in extreme nationalist circles. Furthermore, it appeared that two police departments and one gendarmerie department had been informed of the likelihood of an assassination attempt and even of the identity of the alleged instigators. The threat of an assassination could therefore be said to have been real and imminent. However, none of the three authorities concerned had taken action to prevent the crime. Admittedly, the journalist had not requested increased protection; however, he could not have known about the plan to assassinate him and it had therefore been for the authorities in question to take action. In sum, the latter had not taken the reasonable measures available to them to prevent a real and immediate risk to the journalist's life.

Conclusion: violation (unanimously).

Article 10: (a) *Victim status* – At the time of the first applicant's death, the Court of Cassation had upheld the finding that he was guilty of denigrating

Turkishness. This ruling, taken on its own or coupled with the lack of measures to protect the journalist against attacks by nationalist extremists, had amounted to interference with the exercise of his right to freedom of expression. Accordingly, the journalist had victim status in relation to Article 10 and the remaining applicants had a legitimate interest in obtaining a finding that his conviction had been in breach of the right to freedom of expression.

(b) *Necessity of the interference* – Analysis of the full series of articles showed clearly that what the journalist had described as "poison" had not been "Turkish blood", as held by the Court of Cassation, but the "perception of Turkish people" by Armenians and the obsessive nature of the Armenian diaspora's campaign to have Turkish people recognise the events of 1915 as genocide. A study of the way in which the notion of Turkishness had been interpreted by the Court of Cassation showed that the latter had indirectly penalised the journalist for criticising the State institutions' denial that the events amounted to genocide. Article 10 did not permit restrictions on freedom of expression in the sphere of political debate and issues of public interest, and the limits of permissible criticism were wider with regard to the government than in relation to private individuals. Furthermore, the series of articles taken overall did not incite others to violence, resistance or revolt. The author had been writing in his capacity as a journalist and editor-in-chief of a Turkish-Armenian newspaper, commenting on issues concerning the Armenian minority in the context of his role as a player on the political scene. He had merely been conveying his ideas and opinions on an issue of public concern in a democratic society. In such societies, the debate surrounding historical events of a particularly serious nature should be able to take place freely, and it was an integral part of freedom of expression to seek historical truth. Finally, the impugned articles had not been gratuitously offensive or insulting, and they had not incited others to disrespect or hatred. The journalist's conviction for denigrating Turkishness had therefore not answered any pressing social need.

(c) *Positive obligations* – States had positive obligations in relation to freedom of expression: they must not just refrain from any interference but must sometimes take protective measures even in the sphere of the relations of individuals between themselves. They were also required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. In view of the authorities' failure to protect the journalist against the attack by members of an extreme nationalist group and his conviction in the absence of a pressing social need, the respondent State had not complied with its positive obligations with regard to the journalist's freedom of expression.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been a violation of Article 2 in its procedural aspect and of Article 13 taken in conjunction with Article 2.

Article 41: EUR 100,000 jointly to the journalist's widow and children, and EUR 5,000 to his brother, in respect of non-pecuniary damage.

Freedom to receive information
Freedom to impart information

Police seizure of material that could have led to identification of journalistic sources: *violation*

Sanoma Uitgevers B.V. v. the Netherlands - 38224/03
Judgment 14.9.2010 [GC]

Facts – The applicant company owned a car magazine which decided to publish an article on illegal road racing. Journalists from the magazine obtained permission from the organisers of one of these events to take photographs on condition that they did not disclose the participants' identity. The original photographs were stored on a CD-ROM and the intention was to edit the photographs in the published version so as to conceal the identities of the cars and the participants. However, before the article could be published, the editor-in-chief of the magazine was served with a summons from a public prosecutor requiring the surrender of the photographs on the grounds that they were required in connection with a criminal investigation into a "matter of life and death". When he refused, he was threatened with prosecution and detention and told that the company's premises would be searched and its computers removed. A temporary closure of its premises would have entailed important financial losses for the company. The editor-in-chief was later detained on the company premises for a period of four hours. The CD-ROM containing the photographs was subsequently surrendered after a duty investigating judge, who had intervened at the company's request and with the prosecutors' agreement, expressed the view that the needs of the criminal investigation outweighed the company's

journalistic privilege. The seizure was ruled lawful by a regional court after it had heard evidence from the public prosecutor that the photographs were required to help identify a car suspected of having been used in ram raids on cash dispensers, and that the investigation did not concern the road race. That decision was upheld on appeal.

Law – Article 10: The authorities had clearly indicated that a search of the applicant company's premises would be carried out unless the CD-ROM was handed over. This would have entailed the temporary closure of its offices and delays in the publication of perishable news items. One of the magazine's journalists had also been arrested for a brief period. Accordingly, even though no actual search or seizure had taken place, the case had concerned an order for the compulsory surrender of journalistic materials containing information capable of identifying journalistic sources. That order constituted, in itself, an interference with the applicant company's freedom to receive and impart information.

As to whether that interference had been "prescribed by law", it was common ground that it had a statutory basis, namely Article 96a § 3 of the Code of Criminal Procedure. However, the Court reiterated that, in order to satisfy the "quality" of law requirement, any interference with the right to protection of journalistic sources and of information that could lead to their identification had to be attended with legal procedural safeguards commensurate with the importance of the principle at stake. First and foremost among these safeguards was the guarantee of a review by an independent and impartial body vested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources had existed prior to the handing over of any relevant material and to prevent unnecessary access to information capable of disclosing the sources' identity if not. Such a review was preventive in nature and the review body had to be in a position to weigh up the potential risks and respective interests prior to any disclosure and with reference to the material whose disclosure was sought. Conducting the review *ex post facto* would undermine the very essence of the right to confidentiality. The review body's decision should be governed by clear criteria, including as to whether less intrusive measures would suffice, and it should have the power to refuse disclosure or to make limited or qualified orders in order to protect sources, whether or not specifically named in the materials.

Applying these principles to the applicant company's case, the Court noted that since the entry into force of Article 96a of the Code of Criminal Procedure, the power to order disclosure had been entrusted to the public prosecutor, rather than to an independent judge. Although bound by the requirements of basic integrity, in procedural terms the prosecutor was a "party" defending interests potentially incompatible with the protection of journalistic sources and could hardly be seen as objective and impartial. Further, although the applicant company's request for the involvement of the investigating judge had been granted, his intervention had been without legal basis and he had played only an advisory role, without any legal authority. Such a situation was scarcely compatible with the rule of law. Those failings had not been cured by the *ex post facto* review by the regional court, which had been powerless to prevent the public prosecutor and the police from examining the photographs stored on the CD-ROM once in their possession.

In conclusion, the quality of the law in question had been deficient in the absence of a procedure attended by adequate legal safeguards enabling an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. Accordingly, the interference had not been "prescribed by law".

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

ARTICLE 13

Effective remedy

Lack of effective remedy to claim damages for delays in criminal proceedings: *violation*

McFarlane v. Ireland - 31333/06
Judgment 10.9.2010 [GC]

Facts – In January 1998 the applicant, who had just been released from prison in Northern Ireland, was arrested by Irish police in connection with a kidnapping that had taken place in December 1983. He was charged with various offences, some carrying a life sentence, and released on conditional bail. He subsequently made two applications for an order prohibiting his prosecution on the

grounds that his right to a fair trial had been irretrievably prejudiced both by the loss of original fingerprint evidence and by delays in the proceedings. In the first application, the Supreme Court ruled in 2006 that the loss of fingerprint evidence was not prejudicial as the forensic report had been preserved and that it had been entirely legitimate for the Irish police to have waited for the applicant's release from prison before arresting him. In the second application, in which the applicant had argued that delays since his arrest had violated his constitutional right to a trial with reasonable expedition, the Supreme Court noted, *inter alia*, that the only specific relief the applicant had sought was an order prohibiting the trial, and that, even assuming a breach of his constitutional right to an expeditious hearing, the circumstances had not warranted an order preventing his continued prosecution. The applicant had not claimed damages and it was not the Supreme Court's role to pronounce in the abstract on the availability of damages as a remedy. During the course of the criminal proceedings, the applicant was required to report once a month to a police station some eighty kilometres from his home in Belfast and to attend the Special Criminal Court in Dublin (a round trip of approximately 320 kilometres) on some forty occasions. The proceedings ended in June 2008 with the applicant's acquittal.

Law – Article 13 in conjunction with Article 6 § 1: The Court did not find effective any of the domestic remedies that had been proposed by the Government. There was significant uncertainty as to the availability of the principal remedy they proposed, namely an action for damages for breach of the constitutional right to reasonable expedition. While that remedy had been available in theory for almost twenty-five years, it had never been invoked and recent *dicta* of the domestic courts indicated that its availability in practice remained an open question. That situation was to be distinguished from the time which the Court's jurisprudence accorded to allow a new and specifically adopted remedy for delay to be tested. The development and availability of a remedy said to exist, including its scope and application, had to be clearly set out and confirmed or complemented by practice or case-law. Moreover, as no specific and streamlined procedures had been developed for the proposed remedy, it would amount to a legally and procedurally complex constitutional action for damages in the High Court, with a likely appeal to the Supreme Court presenting, at least initially, some legal novelty. This entailed two consequences that were also liable to undermine the effectiveness of the remedy: firstly, the time such proceedings were likely to take (possibly several years) and, secondly, potentially high legal costs and expenses.

As to the remaining remedies proposed by the Government, an action in damages under the European Convention on Human Rights Act 2003 would be ineffective since, *inter alia*, it appeared that any delay attributable to "the courts" was not actionable under that Act and, in any event, the Act (which was not retroactive) had not entered into force until 31 December 2003, by which time the applicant's proceedings had been pending for almost six years. An application for a prohibition order by reason of prejudice and real risk of unfair trial could, in principle, be an effective remedy for a complaint about delay causing potential unfairness at trial but, having regard to the additional balancing exercise inherent in prohibition proceedings due to delay, it could not constitute an effective remedy for a complaint of unreasonable delay within the meaning of Article 6 § 1.

In sum, the Government had not demonstrated the existence of effective remedies available to the applicant in theory and practice at the relevant time.

Conclusion: violation (twelve votes to five).

Article 6 § 1: The criminal proceedings against the applicant had lasted over ten and a half years, from his arrest in January 1998 to his acquittal in June 2008. Although his conduct had contributed to the delays, it did not explain the overall length of the proceedings. The Government had not provided convincing explanations for certain delays attributable to the authorities, who had been under a particular obligation to expedite matters in view of the fact that the criminal proceedings had not started until well after the alleged offences had taken place. Nor was it relevant here that the applicant might have been able to apply for an order expediting the proceedings, as that did not exempt the courts from their duty to ensure that the reasonable-time requirement was complied with. The applicant had borne the weight of what were serious charges carrying heavy sentences for the duration of the proceedings, during which time he had also had reporting obligations and been required to attend court in Dublin. In these circumstances, the overall length of the criminal proceedings had been excessive.

Conclusion: violation (twelve votes to five).

Article 41: EUR 5,500 in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 8)

Refusal of request for adoption made by mother's civil partner: *admissible*

Gas and Dubois v. France - 25951/07
Decision 31.8.2010 [Section V]

Facts – The applicants have cohabited since 1989. In September 2000 the second applicant gave birth in France to a daughter conceived in Belgium by means of medically-assisted procreation using an anonymous donor. The child does not have an established parental tie with the father, in accordance with Belgian law. She has lived all her life in the applicants' shared home. In April 2002 the applicants entered into a civil partnership agreement. In March 2006 the first applicant applied to the *tribunal de grande instance* for a simple adoption order in respect of her partner's daughter; her partner had given her express consent before a notary. In July 2006 the court observed that the statutory conditions for the adoption had been met and that it had been demonstrated that the applicants were actively and jointly involved in the child's upbringing, caring for and displaying affection towards her. However, it refused the application on the grounds that the adoption would have legal consequences running counter to the applicants' intentions and to the child's best interests, as it would transfer parental authority to the adoptive parent and thereby deprive the biological mother of her rights in respect of the child. The court of appeal upheld the judgment. The applicants appealed on points of law, but did not pursue the appeal to its conclusion.

Law – Article 14 in conjunction with Article 8:
(a) *Objection of inadmissibility for failure to exhaust domestic remedies*: In February 2007 the applicants had lawfully appealed on points of law against the judgment of the court of appeal, but had not complied with the requirement to submit further pleadings by July 2007 at the latest. However, in February 2007 two judgments in cases concerning similar facts to the applicants' case, and raising the same issue of law, had rejected applications for a simple adoption order from the civil partner of the child's mother. These judgments had subsequently been upheld by judgments of December 2007 and February 2008. Given the authority enjoyed by the Court of Cassation in the French judicial system and the nature of the judgments delivered in February 2007, which had settled clearly and unambiguously an issue of law that had previously been the subject of diverging interpretations by the lower courts, the Court took the view that the applicants could legitimately infer from those rulings that an appeal on points of law before the same court would have no prospect of success. The Court further noted, as had the applicants, that in their submissions to the court of appeal, which they adduced in support of the present application, they had alleged a violation of Article 8.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Objection of incompatibility* ratione materiae – The applicants alleged that they had been discriminated against on the basis of their sexual orientation; since they could not marry on account of their sexual orientation, they and their child had been refused the right to a simple adoption although they had been living for years in a *de facto* family situation comparable to that of opposite-sex couples. Their request had been aimed at establishing a legal parent-child relationship between the first applicant and the child, while retaining the original parent-child relationship, and its essential purpose had been to confer legal status on an existing *de facto* situation. The two persons concerned had been living together since 1989 and had entered into a civil partnership in 2002 which had established contractual ties between them concerning the organisation of their life together. One of the partners was the biological mother of the child, who had been wished for by both partners and had been conceived by means of medically-assisted procreation using an anonymous donor. The applicants had raised the child since her birth and were jointly and actively involved in her upbringing, a fact acknowledged by the domestic courts. In the circumstances, the relationship between the applicants and the child amounted to family life within the meaning of Article 8. The Court therefore held that Article 14 in conjunction with Article 8 was applicable.

Conclusion: preliminary objection dismissed (unanimously).

Admissible under Article 14 in conjunction with Article 8.

Refusal of reversionary pension to survivor of civil partnership between two people of the same sex: *inadmissible*

Manenc v. France - 66686/09
Decision 21.09.2010 [Section V]

Facts – The applicant cohabited for twenty-six years with M.D., a fellow hospital administrator. He stated that the couple had entered into a civil partnership agreement in 2004. Following M.D.'s death in 2009, the applicant applied to two retirement funds for a survivor's pension. His applications were rejected on the ground that the requirement of a lawful marriage, sanctioned by a marriage certificate, had not been met. In his application to the Court the applicant alleged that this requirement was discriminatory, in particular towards persons who had entered into a civil partnership agreement, and more especially same-sex couples.

Law – Article 14 in conjunction with Article 8: While Article 8 did not address the issue of survivors' pensions for the surviving spouse of a deceased insured, French legislation expressly provided for such a right. Accordingly, the circumstances of the case came within the ambit of Article 8 of the Convention, and Article 14 was applicable.

As to whether the applicant was in a situation identical to or comparable with that of a surviving spouse, the Court observed that, while the conclusion of a civil partnership agreement under French law entailed a degree of solemnity, in that it went beyond a mere community of interest and conferred rights and obligations in relation to taxation, property and social issues, it nevertheless differed from marriage in terms of the conditions for entering into it, its scope – particularly with regard to inheritance – and its termination, which simply required a unilateral declaration by one of the partners. In particular, unlike marriage, it did not entail any joint financial responsibilities, notably in the event of death. Hence, the applicant had not been in a situation identical to or comparable with that of a surviving spouse following M.D.'s death. In that connection, the Court observed that the fact that the legal framework in force in France did not permit marriage between same-sex couples was not in itself sufficient to place the applicant in such a situation with regard to the pension rights he was claiming.

Furthermore, there was nothing to indicate that the difference in situation had been determined by the applicant's sexual orientation, given that any person in the same situation would have received the same treatment, regardless of the sex of his or her partner. The survivor's pension had been refused to the applicant solely on the ground that he had been in a civil partnership. Consequently, the French legislation on survivors' benefits pursued a legitimate aim, namely the protection of the family based on the bonds of marriage; the limiting of the scope of the legislation to married couples, to the exclusion of partners in a civil partnership regardless of their sexual orientation, fell within the broad margin of appreciation accorded to the States by the Convention in this sphere. Hence, the domestic legislation was not manifestly without reasonable foundation.

Conclusion: inadmissible (manifestly ill-founded).

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment on grounds of sexual orientation in relation to child-support regulations: *violation*

J.M. v. the United Kingdom - 37060/06
Judgment 28.9.2010 [Section IV]

Facts – The applicant is the divorced mother of two children who live mainly with their father. Since 1998 she has been living with another woman in a long-term relationship. As the non-resident parent, she is required by child-support regulations to contribute financially to the cost of her children's upbringing. Her child-maintenance obligation was assessed in September 2001 in accordance with the regulations that applied at the time which provided for a reduced amount where the absent parent had entered into a new relationship (married or unmarried) but took no account of same-sex relationships. The applicant complained that the difference was appreciable – she was required to pay approximately GBP 47 per week, whereas if she had formed a new relationship with a man the amount due would have been around GBP 14. Her complaint was upheld by three levels of jurisdiction, but the case was overturned by a majority ruling in the House of Lords in 2006 which found, *inter alia*, that the applicant's situation was not within the ambit of Article 1 of Protocol No. 1, a provision it saw as being primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal obligation of an absent parent.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The House of Lords' view that the facts of the case did not come within the ambit of Article 1 of Protocol No. 1 was, in the context of a complaint of discrimination, too narrow. In particular in the context of entitlement to social-security benefits, a claim could fall within the ambit of Article 1 of Protocol No. 1 so as to attract the protection of Article 14 even in the absence of any deprivation of, or other inter-

ference with, the existing possessions of the applicant. As it was, the statutory obligation on an absent parent to pay money to the parent with custody could be regarded as an interference with the right to the peaceful enjoyment of his possessions; moreover, the sums the applicant paid towards the upkeep of her children were to be considered "contributions" within the meaning of the second paragraph of Article 1. The situation thus fell within the ambit of Article 1 of Protocol No. 1, to which it most naturally belonged, and Article 14 was applicable. The Court did not find it necessary to go on to decide whether the facts of the case also fell within the ambit of Article 8.

The only relevant point of difference between the applicant's situation and the comparable situation of an absent parent who forms a new relationship with a person of the opposite sex was the applicant's sexual orientation. Particularly convincing and weighty reasons were required for a difference of treatment on such grounds and the State's margin of appreciation in such cases was narrow. Bearing in mind the purpose of the regulations, which was to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court could see no reason for treating the applicant differently. It was not readily apparent why her housing costs should have been taken into account differently than would have been the case had she formed a relationship with a man. There had been no sufficient justification for such discrimination at the material time and the matter had not been within the respondent State's margin of appreciation at the time. The reforms introduced by the Civil Partnership Act 2004 some years later, however laudable, had no bearing on the matter.

Conclusion: violation (unanimously).

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

ARTICLE 34

Hinder the exercise of the right of petition

Alleged inability of physically disabled applicant to exhaust domestic remedies, owing to lack of special facilities providing access to public services: *inadmissible*

Farcaş v. Romania - 32596/04
Decision 14.9.2010 [Section III]

(See Article 6 § 1 (civil) above, page 17)

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Russia

Claim for compensation under Federal Law no. 68-*ФЗ* for the non-enforcement of judgments or procedural delays: *effective remedy*

Nagovitsyn and Nalgiyev v. Russia - 27451/09 and 60650/09
Fakhretdinov and Others v. Russia - 26716/09 et al
Decisions 23.9.2010 [Section I]

Facts – In a pilot judgment of 15 January 2009 (*Burdov v. Russia (no. 2)*, no. 33509/04, Information Note no. 115) the Court required the respondent State to set up an effective domestic remedy to secure adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic judgments, a problem which had been identified as structural. In response to that judgment, the Russian Parliament adopted legislation affording a right to monetary compensation in cases where trials were not held or judgments were not enforced within a reasonable time (Federal Law no. 68-*ФЗ* on Compensation for Violation of the Right to a Trial within a Reasonable Time or the Right to Enforcement of a Judgment within a Reasonable Time – "the Compensation Act"). Under the Compensation Act, the level of compensation is determined by the courts by reference to a number of factors including the length of the delays, the impact on the claimant, the principles of reasonableness and fairness, and the practice of the European Court. Transitional provisions enable claims for compensation to be made to the domestic courts even where an application has been lodged with the European Court (provided they are made within six months of the entry into force of the Compensation Act and the European Court has not already ruled on the admissibility of the application).

The applicants in the instant cases had, prior to the *Burdov (no. 2)* judgment, lodged applications with the Court complaining either of the non-enforcement of domestic court judgments in their favour (*Nagovitsyn and Nalgiyev*) or of the length of court proceedings (*Fakhretdinov and Others*). In May 2010 they and all other applicants in the same position were advised by the Court to make use of the new remedy within the six-month time-limit

set by the Compensation Act. The applicants subsequently informed the Court that they had either already brought proceedings under the new Act or intended to use the remedy. However, they explicitly stated that they wished to pursue their applications before the Court. In particular, Mr Nagovitsyn and Mr Nalgiyev challenged the capacity of the new remedy to provide adequate redress.

Law – Article 35 § 1: The new domestic remedy afforded by the Compensation Act was available to the applicants and their claims were not time-barred. Indeed, some of the applicants had already made use of the remedy.

As regards the effectiveness of the remedy, the Court noted that the new legislation required the domestic courts when deciding compensation claims to apply the Convention criteria as established in the Court's case-law. It had thus been designed to address the issues of delayed enforcement of judgments and excessive length of judicial proceedings in an effective and meaningful manner. Although it was true that the domestic courts had not had the time to establish any stable practice under the Compensation Act, the Court saw no reason to believe that, despite its purely compensatory nature, the new remedy would not afford the applicants the opportunity to obtain adequate and sufficient compensation for their complaints or that it would not offer reasonable prospects of success. While acknowledging that an issue might subsequently arise regarding effectiveness were the respondent State still not to honour a judgment debt or respect the right to a trial within a reasonable time notwithstanding one or more compensation awards, the Court did not find it appropriate to anticipate such an event, or to decide that issue *in abstracto* at the present stage.

Once a domestic compensatory remedy had been introduced, it became particularly important for complaints to be considered in the first place and without delay by the national authorities, which were better placed and equipped to establish the relevant facts and to calculate monetary compensation. It was significant that the Compensation Act had been passed in response to a pilot-judgment procedure, one of whose aims was to allow the speediest possible redress to be granted at the national level to the large numbers of people suffering from structural problems within the domestic system. It was also relevant that people who had already applied to the Court before the entry into force of the Act were, under the transitional provisions, entitled to seek redress before the domestic courts. It would therefore be in line with the spirit and logic of the pilot judgment for them to claim redress for their grievances through the new domestic remedy. Accordingly, while the Court might exceptionally decide, for the sake of fairness and effectiveness, to conclude its proceedings by a judgment in certain cases of this kind which had remained on its list for a long time or had already reached an advanced stage of proceedings, it would require, as a matter of principle, all new cases introduced after the pilot judgment and falling under the Compensation Act to be submitted in the first place to the national courts. That position could be subject to review in the future depending, in particular, on the domestic courts' capacity to establish consistent case-law under the Compensation Act in line with the Convention requirements. In conclusion, the applicants were required to exhaust the new domestic remedy.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 35 § 3

Competence *ratione materiae*

Prohibition on members' use of Tahitian during French Polynesian Assembly debates: *inadmissible*

Birk-Levy v. France - 39426/06
Decision 21.9.2010 [Section V]

Facts – The applicant was a member of the Assembly of French Polynesia ("the Assembly"), to which she was elected on two consecutive occasions, in 2003 and 2005. A provision of the Assembly's rules of procedure authorised the use of Tahitian or other Polynesian languages in debates. However, in a judgment of 29 March 2006 on an application for judicial review lodged by the High Commissioner of the Republic in French Polynesia, the *Conseil d'Etat* declared the provision void on the ground that it contravened the Institutional Act on the autonomous status of French Polynesia, which provides that French is the official language of French Polynesia and that its use is compulsory for public-law entities in particular. Relying on Articles 10, 11 and 14 of the Convention, the applicant complained that the Assembly's representatives were prohibited from expressing themselves in Tahitian, and argued that the obligation to speak French in the assembly chamber amounted to discrimination both against her and against all Polynesians, who used Tahitian on an everyday basis.

Law – Article 35 § 3: No provision of the Convention expressly guaranteed "linguistic freedom" as such, or the right of elected representatives to use the language of their choice when making statements and voting within an assembly. Each State indisputably had a legitimate interest in ensuring that its own institutional system functioned normally. Having regard to the principle of respect for national characteristics, the Court was not required to adopt a position on the choice of a national parliament's working language. That decision, determined by historical and political considerations specific to each country, was in principle one which the State alone had the power to make.

The Court noted that, following a lengthy historical and political process, French Polynesia had become an overseas community (*collectivité d'outre-mer*) governed by the French Constitution and thus enjoyed a certain autonomy, in particular having its own legislative assembly which was empowered to pass "territorial laws", subject to "special judicial review" by the *Conseil d'Etat*. The Institutional Act on the autonomous status of French Polynesia provided that French was the official language and that its use was compulsory for public-law entities, for private-law entities when performing public services, and for the public in their dealings with administrative authorities and public services. Although the Institutional Act acknowledged the Tahitian language as "a fundamental element of cultural identity", the Court considered, having regard to the principle of respect for States' national characteristics in relation to their own institutional system, that the applicant's assertion of a right to use the Tahitian language in the Assembly fell outside the scope of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 41

Just satisfaction

State interference in the internal leadership dispute of a divided religious community: *non-pecuniary damage award*

Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria
- 412/03 and 35677/04
Judgment (just satisfaction) 16.9.2010 [Section V]

Procedure – In a judgment of 22 January 2009, the Court held that there had been a violation of Article 9 of the Convention on account of the Bulgarian authorities having forced the divided Orthodox religious community to unite under one of its two rival leaderships. The question of the application of Article 41 was reserved (see Information Note no. 115).

Law – Article 41

(a) *Claim for a return to the* status quo ante – In the circumstances of the instant case, the principle of *restitutio in integrum* could not be seen as requiring the respondent State to engage in yet further interference in the internal organisation of the Church in order to restore the applicant organisation's control over assets, reinstate clergy members in their previous positions or otherwise force a return to the *status quo ante*. Such actions would encroach on the internal autonomy of the Bulgarian Orthodox Church. Just satisfaction would therefore have to take the form of compensation to be paid by the State.

(b) *Pecuniary damage* – The applicant organisation, one of the rival leaderships of the Church, did not have a separate proprietary interest in buildings or other assets which were the property of parishes that adhered to it or the Church as a whole. The State action which had violated Article 9 had not encroached on property rights but had interfered with the free choice of the Church's leadership. The claims of the applicant organisation for compensation in respect of pecuniary damage were therefore dismissed. As regards the individual applicants, the violation found concerned their freedom of religion and not their professional activities as employees of the Bulgarian Orthodox Church. Their claims were, therefore, also dismissed.

(c) *Non-pecuniary damage* – Having regard to the nature and scale of the violation of the applicant organisation's rights under Article 9, the Court, deciding on an equitable basis, awarded the applicant organisation EUR 50,000 to be paid to Metropolitan Inokentiy, its leader at the relevant time, for the benefit of the religious community. Since the leadership directly affected by the violation of Article 9 had claimed compensation for the non-pecuniary damage suffered by the religious community, there was no room for separate awards to the individual applicants.

Article 46: The general measures to execute the Court's principal judgment in this case should include amendments to the Religious Denominations Act 2002 to ensure that leadership conflicts

in religious communities were left to be resolved by the religious community concerned and that disputes about the civil consequences of such conflicts were decided by the courts.

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to introduce effective remedy for length-of-proceedings claims within one year

Rumpf v. Germany - 46344/06
Judgment 2.9.2010 [Section V]

Facts – The case concerned the excessive length of civil proceedings before the domestic courts (over thirteen years for four levels of jurisdiction) and the lack of an effective domestic remedy in such cases. After unanimously finding violations of Article 6 § 1 and Article 13 of the Convention in the applicant's case, the European Court turned to the question of general measures.

Law – Article 46: Between 1959 and 2009 the Court had delivered judgments in more than 40 cases against Germany finding repeated violations of the Convention on account of the length of civil proceedings. In its Grand Chamber judgment in the case of *Sürmeli v. Germany* ([GC], no. 75529/01, 8 June 2006, Information Note no. 87), it had pointed to the lack of an effective remedy and drawn the respondent Government's attention to its obligation to select, subject to supervision by the Committee of Ministers, general measures to put an end to the violation found and to redress as far as possible its effects. While the Court welcomed a recent legislative initiative by the Government aiming to address the problem, it noted that Germany had so far failed to put into effect any measures aimed at improving the situation, despite the Court's substantial and consistent case-law on the matter. The systemic character of the problem was further evidenced by the fact that some fifty-five applications against Germany concerning similar problems were currently pending before the Court and the number of such applications was constantly increasing. Accordingly, the violations found in the applicant's case were the consequence of the respondent Government's shortcomings and a practice incompatible with the Convention. Germany was therefore required to introduce without delay, and at the latest within one year of the Court's judgment becoming final, an effective domestic remedy against excessively long court proceedings. In the interim, the Court would continue to process similar pending cases in the usual manner in order to remind the respondent State on a regular basis of its obligation under the Convention and in particular its obligation resulting from the judgment in the applicant's case.

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

Respondent State required to amend legislation on religious denominations

Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria - 412/03 and 35677/04
Judgment (just satisfaction) 16.9.2010 [Section V]

(See Article 41 above, page 32)

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people

Arbitrary invalidation of election results in a parliamentary constituency and ineffectiveness of judicial review: *violation*

Kerimova v. Azerbaijan - 20799/06
Judgment 30.9.2010 [Section I]

Facts – The applicant stood as an opposition candidate in the November 2005 elections to Parliament. She received the largest number of votes in her constituency, having obtained 5,566 votes as compared to the 3,922 votes cast in respect of a candidate from the ruling political party, who came second. Following the official tabulation of the results the next day, she featured in the electoral protocol as "the elected candidate". On 8 November 2005 the Central Election Commission invalidated the election results in the applicant's constituency after finding that the protocols had been tampered with making it impossible to determine the will of the voters. The applicant appealed, arguing that the changes in the protocols had in effect reduced the number of votes recorded in her favour and had increased those cast in favour of the candidate immediately after her and that she remained the winner despite the changes. Her appeals were

unsuccessful. In the meantime, two election officials were convicted of having falsified the election results in the applicant's constituency, for the benefit of other candidates.

Law – Article 3 of Protocol No. 1: Even despite the fact that the irregularities had been made in an attempt to inflate the number of votes for the applicant's opponents, the election results had still showed the applicant as a clear winner. Yet in their decision to invalidate the results, the election authorities had not given any reasons to explain why the alleged breaches had altered the outcome of the elections. Nor had they even considered the possibility of recounting the votes once the irregularities had been established. Furthermore, the Electoral Code prohibited the invalidation of election results at any level on the basis of a finding of irregularities committed for the benefit of candidates who lost the election. However, neither the electoral authorities, nor the domestic courts had endeavoured to determine in whose favour the alleged irregularities had worked. Despite the fact that the applicant had repeatedly raised these points in her appeals, the domestic courts had failed to adequately address them. Nor had they examined any primary evidence. The examination of the applicant's appeals had therefore been ineffective. As a result, the authorities' inadequate approach had brought about a situation where the election process in the entire electoral constituency had been single-handedly sabotaged by two electoral officials who had abused their position by making changes to a number of election protocols. By arbitrarily invalidating the election results because of those officials' actions, the national authorities had essentially helped them to obstruct the election. Consequently, the decision to invalidate the election had been unsubstantiated and was in apparent breach of the procedure established by the domestic electoral law. This decision had arbitrarily infringed the applicant's electoral rights by depriving her of the benefit of election to Parliament. It had also shown a lack of concern for the integrity and effectiveness of the electoral process which could not be considered compatible with the spirit of the right to free elections.

Conclusion: violation (unanimously).

Article 41: (a) *Pecuniary damage* – The applicant had submitted detailed information about the difference between the salaries she would have received as a member of parliament and her other income which she had been receiving during the relevant period, which information was in principle sufficient to calculate her "net loss". Had the applicant become a member of parliament, she could have been expected to serve at least part of her tenure and receive certain income from her service. Accordingly, she had suffered certain pecuniary damage, although this damage could not be technically quantified in terms of monthly salaries for the entire term of service of a member of parliament. Making its assessment on an equitable basis, the Court awarded the applicant EUR 50,000.

(b) *Non-pecuniary damage* – EUR 7,500.

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Nada v. Switzerland - 10593/08 [Section I]

(See Article 5 § 1 above, page 13)

Stanev v. Bulgaria - 36760/06 [Section V]

(See Article 5 § 1 above, page 14)