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

Information Note on the Court's case-law

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Expulsion

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

Omeredo v. Austria - 8969/10
Decision 20.9.2011 [Section I]

Facts – 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 complained under Article 3 of the Convention that she ran 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 violate her rights under that provision.

Law – Article 3: It was not in dispute that subjecting any person, child or adult, to FGM would amount to ill-treatment contrary to Article 3 (see also *Izevbekhai and Others v. Ireland* (dec.), no. 43408/08, 17 May 2011). The Court noted, however, that while the domestic authorities had found that the applicant's fear of being forced to undergo FGM in Nigeria was well-founded they considered that she disposed of an internal flight alternative within the country. The Court therefore had to assess the applicant's personal situation in Nigeria. The applicant, who was thirty-seven years old, had obtained school education for at least thirteen years and had worked as a seamstress for eight years. While it might be difficult for her to live in Nigeria as an unmarried woman without the support of her family, the fact that her circumstances there would be less favourable than those she enjoyed in Austria could not be regarded as decisive. Owing to her education and work experience as a seamstress, there was reason to believe that she would be able to build up her life in Nigeria without having to rely on the support of family members.

Conclusion: inadmissible (manifestly ill-founded).

Inhuman or degrading treatment

Prosecution of child aged twelve years and eleven months in assize court: *communicated*

Agit Demir v. Turkey - 36475/10
[Section II]

In December 2009 the DTP (Party for a Democratic Society) staged a demonstration. In January 2010 the anti-terrorist squad, having identified the applicant, aged twelve years and eleven months at the time, from video footage, arrested him on the grounds that he had thrown stones at the security forces during the demonstration and had brandished a picture of Abdullah Öcalan, leader of the PKK (Workers' Party of Kurdistan). The applicant was detained pending trial. In February 2010 the public prosecutor brought criminal proceedings against him in a special assize court for an offence committed on behalf of the PKK, an illegal armed organisation, for disseminating propaganda in support of the PKK and for a breach of the law on meetings and demonstrations. In April 2010 the court granted the applicant bail. It appears from the case file that the criminal proceedings are still pending before the assize court.

In his application to the European Court the applicant alleges, among other things, that his prosecution before a court which, in his view, did not have jurisdiction to try children amounted to ill-treatment, and that the court in question was not competent, independent or impartial. He also complains of the excessive length of his pre-trial detention. Lastly, he alleges a breach of his right to respect for his family life on the grounds that, owing to the distance of the prison from his home, he was unable to receive regular visits from his family.

Communicated under Article 3 (substantive aspect) and Articles 5 § 3, 5 § 4 and 8 of the Convention.

Positive obligations

Failure to effectively apply criminal-law mechanisms to protect child from sexual abuse: *violation*

M. and C. v. Romania - 29032/04
Judgment 27.9.2011 [Section III]

Facts – The first applicant was awarded custody of her son, the second applicant, after her divorce from the boy's father who was allegedly of a violent temperament. Three years later, shortly after the father was granted contact rights, the first applicant filed a criminal complaint against him alleging attempted sexual abuse of their son. The complaint was supported by a medical certificate issued some days earlier attesting to injuries to the boy's anus which could have been produced by a sexual assault. Several witnesses were heard. Both the first applicant and the boy's father sat lie-detector tests the resultsof which indicated that the first applicant, but not the father, may have been lying about the alleged sexual assault. Consequently, the authorities decided not to indict the father. In the interim the first applicant had successfully applied for the boy to be temporarily placed in a State institution, where he remained for over a year. Both parents were allowed to visit once a week, but neither were permitted to take him home. At the first applicant's request, the boy was returned to her in October 1999.

In May 2001 the first applicant lodged a civil action seeking to limit the father's contact with the child. The court hearing the case concluded that the first applicant's intention to completely exclude the father from her son's life was a result of his exclusion from the Jehovah's Witnesses shortly before the couple's divorce and it did not rule out the possibility that the first applicant had caused the child's injuries herself and tried to frame the father. Ultimately, the domestic courts dismissed the first applicant's claim, relying, *inter alia*, on that fact that the authorities had decided not to bring charges against the father.

Law – Articles 3 and 8: The States had a positive obligation under Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing sexual abuse of children and to apply them in practice through effective investigation and prosecution. It therefore had to be determined whether there had been such significant flaws in the criminal investigation as to amount to a breach of Romania's positive obligations in respect of the second applicant. It was true that the authorities had been faced with a difficult task, as they were confronted with a sensitive situation, conflicting versions of events and little direct evidence. They had diligently reacted to the first applicant's request to temporarily place her son in a State institution in order to protect him. Witnesses had been heard and forensic and expert evidence obtained, including the results of a lie-detector test. However, the prosecuting authorities had failed to verify the credibility of all the witness statements and in the final decision to discontinue the criminal proceedings against the father had failed to follow the instruction of their superior and relied exclusively on the evidence collected previously. Most importantly, even though considering it a possibility, the domestic authorities had failed to examine whether the father's conduct could have constituted another criminal offence, such as hitting or other forms of violence. They also failed to examine whether a criminal investigation should be opened against the first applicant. They had attached little weight to the particular vulnerability of young persons and the special psychological factor involved in cases concerning sexual abuse of children. Finally, there had been significant delays in the investigation. In conclusion, the authorities had not explored all the options for a thorough investigation of the case and so had failed to comply with their positive obligations to effectively punish all forms of sexual abuse.

Conclusion: violation in respect of the second applicant (six votes to one).

Article 8: The first applicant also complained that she had been separated from her son as a result of his placement in a State institution for over a year. The Court observed that the second applicant had been placed there at the first applicant's request with a view to protecting him from the violent atmosphere in the family. During his stay, he had received regular weekly visits from both parents and there was no proof or suggestion that the contact with his father had in any way been harmful. The authorities had shown the degree of prudence and vigilance necessary in the sensitive situation at issue and their actions had not been to the detriment of the first applicant or the superior interests of her child.

Conclusion: no violation (unanimously).

Article 41: EUR 13,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (criminal) (administrative)

Fair hearing

Refusal by supreme courts to refer a preliminary question to the European Court of Justice: *no violation*

Ullens de Schooten and Rezabek v. Belgium - 3989/07 and 38353/07
Judgment 20.9.2011 [Section II]

Facts – Refusal by the Court of Cassation and the *Conseil d'Etat* to refer questions relating to the interpretation of European Community law, raised in proceedings before those courts, to the Court of Justice of the European Communities (now the Court of Justice of the European Union) for a preliminary ruling.

Law – Article 6 § 1: The Court noted that in its *CILFIT* judgment,[1] the Court of Justice of the European Communities ("the Court of Justice") had ruled that courts and tribunals against whose decisions there was no judicial remedy were not required to refer a question where they had established that it was not relevant or that the Community provision in question had already been interpreted by the Court of Justice, or where the correct application of Community law was so obvious as to leave no scope for any reasonable doubt. The Court further reiterated that the Convention did not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. Where, in a given legal system, other sources of law stipulated that a particular field of law was to be interpreted by a specific court and required other courts and tribunals to refer to it all questions relating to that field, it was in accordance with the functioning of such a mechanism for the court or tribunal concerned, before granting a request to refer a preliminary question, to first satisfy itself that the question had to be answered before it could determine the case before it.

Nonetheless, Article 6 § 1 imposed an obligation on the national courts against whose decisions there was no judicial remedy under national law to give reasons, based on the exceptions provided for by the case-law of the Court of Justice, for any decision refusing to refer to the latter a preliminary question concerning the interpretation of European Union law, particularly where the applicable law permitted such a refusal only in exceptional circumstances. According to the *CILFIT* judgment, therefore, they had to state the reasons why they considered that the question was not relevant, that the provision of European Union law in question had already been interpreted by the Court of Justice or that the correct application of European Union law was so obvious as to leave no scope for any reasonable doubt. The Court observed that this requirement to give reasons had been complied with in the present case. The Court of Cassation had refused the request to refer the question to the Court of Justice for a preliminary ruling on the grounds that the question whether the principle of the primacy of Community law should take precedence over the *res judicata* principle had already been the subject of a ruling by the Court of Justice, and had constructed a lengthy rationale based on the latter's case-law. The *Conseil d'Etat*, for its part, had refused the request on the grounds that no reasonable doubt existed as to the inapplicability of the relevant provisions and that a ruling from the Court of Justice on the interpretation of other provisions of European Union law could not in any way affect the case before it.

Conclusion: no violation (unanimously).

1. *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81, European Court Reports 1982, page 03415.

Article 6 § 1 (criminal)

Access to court

Judicial review by courts exercising full jurisdiction of administrative decision taken by independent authority: *no violation*

A. Menarini Diagnostics S.r.l. v. Italy - 43509/08
Judgment 27.9.2011 [Section II]

Facts – In 2001 the AGCM, the independent regulatory authority in charge of competition, investigated the Italian applicant company for unfair competition. In a decision of April 2003 it fined the company six million euros for unfair competition on the market for diabetes diagnostic tests, stating that the penalty should serve as a deterrent to all pharmaceutical companies. All the company's appeals against that decision to the administrative court and the *Consiglio di Stato* were rejected.

Law – Article 6 § 1

(a) *Applicability* – Having regard to the various aspects of the case and their respective weight in the matter, the Court considered that the fine imposed on the applicant company was a criminal penalty, so the criminal limb of Article 6 § 1 was applicable.

(b) *Merits* – The impugned penalty was not imposed by a court in adversarial proceedings but

by the AGCM, an independent administrative authority. The applicant company had been able to challenge the penalty before the administrative court and to appeal against that court's decision to the *Consiglio di Stato*. According to the Court's case-law, these bodies met the standards of independence and impartiality required of a court. The administrative courts had examined the applicant company's various allegations, in fact and in law. They had thus examined the evidence produced by the AGCM. The *Consiglio di Stato* had also pointed out that where the administrative authorities had discretionary powers, even if the administrative court did not have the power to substitute itself for an independent administrative authority, it was able to verify whether the administration had made proper use of its powers. As a result, the role of the administrative courts had not been limited simply to verifying lawfulness. They had been able to verify whether, in the particular circumstances of the case, the AGCM had made proper use of it powers. They had been able to examine whether its decisions had been substantiated and proportionate, and even to check its technical findings. Moreover, the review had been carried out by courts having full jurisdiction, in so far as the administrative court and the *Consiglio di Stato* were able to verify that the penalty was fit the offence, and they could have changed it if necessary. In particular the *Consiglio di Stato*, had gone beyond a "formal" review of the logical coherency of the AGCM's reasoning and made a detailed analysis of the appropriateness of the penalty, having regard to the relevant parameters, including its proportionality. The decision of the AGCM had thus been reviewed by judicial bodies having full jurisdiction.

Conclusion: no violation (six votes to one).

Article 6 § 2

Presumption of innocence

Refusal to make defendants' costs orders following their acquittals: *no violation*

Ashendon and Jones v. the United Kingdom
- 35730/07 and 4285/08
Judgment 13.9.2011 [Section IV]

Facts – Both applicants were refused applications for their costs after being acquitted of criminal charges at their respective trials on the grounds that, by their conduct, they had brought the prosecutions upon themselves. The first applicant (Mr Ashendon) had been charged, *inter alia*, with the rape and sexual assault of a vulnerable elderly woman after being found, intoxicated and in apparently compromising circumstances, in the sheltered accommodation where she lived. In refusing to grant him costs, the judge commented that he could not think of another case in which it was more apparent that the defendant's conduct had led to him being brought before the court. The second applicant (Ms Jones), an accountant, had been charged with perverting the course of justice and conspiracy to steal from one of her corporate clients. In rejecting her application for costs following her acquittal, the trial judge explained that by refusing to answer questions before her trial, in particular regarding what on the face of it was an incriminating taped phone call, she had allowed the police to believe that the case against her was stronger than in fact it was and to that extent had brought the prosecution on herself.

In their applications to the European Court, the applicants complained that the trial judge's refusal to award them their costs following their acquittal of criminal charges had violated their right to be presumed innocent, contrary to Article 6 § 2 of the Convention.

Law – Article 6 § 2: After reviewing the case-law in a series of past cases against the United Kingdom,[1] the Court considered that, in the context of defendants' costs orders, the Convention organs had consistently applied the following principles: (i) it was not the Court's role to decide whether a defendant's costs order should have been made in any given case; (ii) it was not for the Court to determine whether, in granting or refusing such an order, the trial judge had acted compatibly with the relevant domestic practice direction; (iii) the Court's task was to consider whether, in refusing to make an order, the trial judge's reasons indicated a reliance on suspicions as to the applicant's innocence after he had been acquitted; (iv) it was not incompatible with the presumption of innocence for a trial judge to refuse to make an order because he considered that the applicant had brought suspicion on himself and misled the

1. The Court's judgment in *Yassar Hussain v. the United Kingdom*, no. 8866/04, 7 March 2006, and the European Commission of Human Rights' decisions or reports in *D.F. v. the United Kingdom*, no. 22401/93, 24 October 1995; *Moody v. the United Kingdom*, no. 22613/93, 16 October 1996; *Byrne v. the United Kingdom*, no. 37107/97, 16 April 1998; and *Fashanu v. the United Kingdom*, no. 38440/97, 1 July 1998.

prosecution into believing that the case against him was stronger than it was in reality; (v) this will also be the case if the applicant brought the prosecution upon himself because he availed himself of the right to silence; and (vi) the refusal to make an order did not amount to a penalty for exercising that right.

(a) *First applicant's case* – While the trial judge's reasons were somewhat imprecise, their meaning was clear from the context. The facts clearly showed that he had been entitled to find that the first applicant – who had been found half-naked in a state of intoxication with the complainant's bodily materials on him – had brought the prosecution on himself. There was nothing in the judge's remarks to indicate a belief that the first applicant's actions meant that he was guilty of rape or sexual assault; disapproval by a judge of a defendant's conduct did not necessarily mean that the judge had formed a view as to whether that conduct amounted to a criminal offence. Further, the judge's reasons for refusing the defendant's costs' order also had to be read alongside his prior direction to the jury to stand back from any feelings of disgust and revulsion and to base their verdict on a "proper, logical, objective analysis" of what had happened. That was an entirely fair direction and supported the Court's view that the trial judge, in refusing the defendant's costs order, did not hold lingering suspicions as to the first applicant's innocence.

Conclusion: no violation (unanimously).

(b) *Second applicant's case* – The principal issue in the case had been the tape recording of a conversation between the second applicant and a third party. The trial judge, who was the person best placed to determine the issue, had concluded that the tape recording was a "cardinal plank" of the prosecution case and that the second applicant's failure to answer questions had allowed the police to believe that the case against her was stronger than it in fact turned out to be. His reasons were carefully phrased and not only did he state that his decision was in no way meant to indicate guilt, he added that she had been rightly acquitted by the jury. The trial judge had also been correct to consider that, while the applicant could not be criticised for exercising her right to silence, that was a relevant consideration in deciding whether a defendant's costs order should be made. In that connection, the Court endorsed the view that had been expressed by the Commission in the cases of *D.F.*, *Byrne* and *Fashanu* that a refusal to make a defendant's costs order did not amount to a penalty for exercising the right to silence.

Conclusion: no violation (unanimously).

Lack of defence of consent or reasonable belief as to complainant's age on charge of rape of a child: *inadmissible*

G. v. the United Kingdom - 37334/08
Decision 30.8.2011 [Section IV]

Facts – By virtue of section 5 of the Sexual Offences Act 2003 a person who has sexual intercourse with a child under thirteen is guilty of rape, whether or not the child willingly took part in the sexual activity and whether or not the defendant reasonably believed that the child was thirteen or over. The applicant, then aged fifteen, was charged with an offence under that provision after having intercourse with a twelve year-old girl. Although he alleged that the intercourse was consensual and that the girl had told him she was the same age as him, he was advised by his lawyers that he had no defence to the charge and so pleaded guilty on the basis that the girl had willingly agreed to intercourse and had told him she was fifteen. His plea was accepted on that basis. He was convicted and initially given a twelve-month detention and training order which was reduced to a conditional discharge on appeal.

In his application to the European Court, the applicant complained under Article 6 §§ 1 and 2 of the Convention that his conviction under section 5 of the 2003 Act was not compatible with the presumption of innocence, and under Article 8 that the criminal proceedings amounted to a disproportionate interference with his right to respect for his private life.

Law – Articles 6 §§ 1 and 2: In principle the Contracting States remained free to apply the criminal law to any act which was not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It was not the Court's role under Article 6 §§ 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused. The offence under section 5 of the 2003 Act had been created in order to protect children from sexual abuse. The objective element (*actus reus*) of the offence was penile

penetration of a child aged twelve or under and the subjective element (*mens rea*) an intention to penetrate. The prosecution had been required to prove these elements beyond reasonable doubt. Knowledge of, or recklessness as to, the age of the child or as to the child's unwillingness to take part in the sexual activity were not elements of the offence and the Court did not consider that the Parliament's decision not to make available a defence based on reasonable belief that the complainant was aged thirteen or over could give rise to any issue under Article 6 §§ 1 or 2. Section 5 of the 2003 Act did not provide for presumptions of fact or law to be drawn from elements proved by the prosecution. The principle established in *Salabiaku v. France*[1] requiring such presumptions to remain within reasonable limits therefore had no application to the applicant's case.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 8: Noting that the applicant, who was aged fifteen at the time of the offence, was convicted and sentenced on the basis that both parties had consented to sexual intercourse and that the applicant had reasonably believed the complainant to be the same age as him, the Court was prepared to accept that the sexual activities at issue fell within the meaning of "private life". The criminal proceedings against him had constituted an interference that was "in accordance with the law" and pursued the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others.

As to whether the continued prosecution, conviction and sentencing of the applicant had been "necessary in a democratic society", the State authorities enjoyed a wide margin of appreciation in cases concerning the protection of children against premature sexual activity, exploitation and abuse. The consequences of penetrative sex for a child of twelve or under could be very harmful. The Court did not consider that the national authorities had exceeded their margin of appreciation either by creating a criminal offence called "rape" which did not allow for any defence based on apparent consent by the child or on the accused's mistaken belief about the child's age, or by deciding to prosecute the applicant for that offence, particularly since the legislation permitted for a broad range of sentences and the mitigating circumstances in the applicant's case had been taken into account on appeal.

Conclusion: inadmissible (manifestly ill-founded).

1. *Salabiaku v. France*, no. 10519/83, 7 October 1988.

ARTICLE 7

Article 7 § 1

Applicability
Heavier penalty

International transfer of prisoner liable to delay his eligibility for conditional release: *inadmissible*

Müller v. the Czech Republic - 48058/09
Decision 6.9.2011 [Section V]

Facts – The applicant, a Czech national, was found guilty by a German court of aiding and abetting murder and given a mandatory life sentence. Under German law, he would have become eligible for conditional release after serving fifteen years, but he was subsequently transferred, without his consent, to serve the remainder of his sentence in the Czech Republic, where he was eligible for parole only after twenty years and where, he alleged, prison conditions were harsher. In his application to the European Court, the applicant complained, *inter alia*, that the Additional Protocol to the Convention on the Transfer of Sentenced Persons, which allowed prisoners to be transferred without their consent, had not come into force until after the commission of his offence and that the Czech courts' decision to validate his conviction and enforce his sentence in the Czech Republic had thus retrospectively aggravated his position.

Law – Article 7 § 1: A distinction had to be drawn between a measure that constituted in substance a "penalty" and a measure that concerned the "execution" or "enforcement" of a "penalty"; Article 7 applied only to the former.[2] The applicant had been tried and convicted in Germany and sentenced to life imprisonment. The Czech courts had merely validated that conviction and ruled that his sentence could be enforced in the Czech Republic. The text of the relevant provisions of the Convention on the Transfer of Sentenced Persons and its Additional Protocol suggested that transfer decisions concerned the enforcement of a penalty – in particular, the place of execution of the sentence – rather than any new penalty. It was immaterial that the applicant might have had to wait longer to become eligible for conditional

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

release in the Czech Republic than he would have done in Germany as the question of conditions for release related to the execution of the sentence as opposed to the "penalty" imposed upon him.[1] Likewise, where the penalty – deprivation of liberty in a prison for a set term – remained the same, any alleged differences in the conditions of detention also fell within the sphere of execution of a penalty. Article 7 of the Convention was therefore not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 8

Private and family life

Denial of access to possible biological father without consideration of child's best interests: *violation*

Schneider v. Germany - 17080/07
Judgment 15.9.2011 [Section V]

Facts – Between May 2002 and September 2003 the applicant had a relationship with a married woman and he claims to be the biological father of her son born in March 2004 whose legal father is the mother's husband. Although the woman and her husband acknowledged that the applicant might be the biological father, they preferred not to verify paternity in the interest of their family. Following the boy's birth the applicant applied to the domestic courts for access to and regular information about his development, but his application was dismissed on the grounds that, even assuming he was the biological father, he did not fall within the group of people – such as the legal father or a person who had developed a social and family relationship with the child – who were entitled to access under the Civil Code. That decision was upheld on appeal and the Federal Constitutional Court declined to consider his constitutional complaint.

Law – Article 8: It was not excluded that the applicant's intended relationship with the boy fell within the ambit of "family life". Although the applicant had not established any family relationship with the child this was because he had been prevented from taking any steps to assume responsibility for him against the legal parents' will. He had, however, had a non-haphazard relationship with the mother for over a year and had sufficiently demonstrated an interest in and commitment to the child both before and after birth: the child had been planned, the applicant had accompanied the mother to medical examinations relating to her pregnancy and he had acknowledged paternity before the birth. In any event, even if the legal relations between the applicant and the child fell short of family life, they nevertheless concerned an important part of the applicant's identity and thus his "private life". The domestic courts' refusal to grant him access and information about the boy constituted an interference which was in accordance with the relevant provisions of the Civil Code and pursued the legitimate aim of protecting the rights and freedoms of others.

As to whether the interference had been necessary in a democratic society, the Court noted that the domestic courts had reached their decision without examining whether, in the particular circumstances of the case, granting the applicant access and providing him with information would be in the child's best interest, or whether the applicant's interest should override that of the legal parents. They had also failed to examine the reasons why the applicant had not previously established a "social and family relationship" or to give any weight to the fact that, for legal and practical reasons, it had been impossible for him to do so. As to the Government's submission that always giving an existing legal family precedence over biological fathers' rights guaranteed stability, the Court was not convinced that the best interest of children living with their legal father but having a different biological father could be truly determined by a general legal assumption. Consideration of what lay in the best interest of the child was of paramount importance in every case of this kind and, in view of the great variety of family situations possibly concerned, a fair balancing of the rights of all persons involved necessitated an examination of the particular circumstances of each case. The domestic courts had failed to conduct such an examination in the applicant's case and had thus failed to give sufficient reasons to justify the interference with his rights.

Conclusion: violation (unanimously).

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

1. See *Kafkaris v. Cyprus*, op. cit., and, with regard to decisions by a sentencing State to transfer a prisoner abroad, *Szabó v. Sweden* (dec.), no. 28578/03, 27 June 2006, Information Note no. 88, and *Csoszánszki v. Sweden* (dec.), no. 22318/02, 27 June 2006.

(See also *Anayo v. Germany*, no. 20578/07, 21 December 2010; and, with regard to the general exclusion from judicial review of the attribution of sole custody to the mother of a child born out of wedlock, *Zaunegger v. Germany*, no. 22028/04, 3 December 2009, Information Note no. 125).

Expulsion

Proposed deportation on account of serious offence committed as minor despite subsequent exemplary conduct: *deportation would constitute violation*

A.A. v. the United Kingdom - 8000/08
Judgment 20.9.2011 [Section IV]

Facts – The applicant, a Nigerian national, arrived in the United Kingdom in 2000 at the age of thirteen to join his mother. Two years later he was convicted of the rape of a thirteen-year-old girl and sentenced to four years' imprisonment. In 2004 he was released on licence owing to his exemplary conduct and consistently good reports (he had obtained various secondary-school-level qualifications while in detention). Shortly before his release the applicant was served with a deportation order based on the gravity of the offence. That order was initially overturned on appeal, but following a fresh hearing of the case, the Asylum and Immigration Tribunal ruled that the public interest in deportation outweighed the applicant's personal circumstances. In the interim, following his release from detention, the applicant had continued his education, ultimately obtaining undergraduate and Master's degrees. He found employment with a local authority in London, where he lived with his mother, who was by now a British citizen, and regularly visited his sisters who also lived there. In September 2010 he was informed by the immigration authorities that they were considering whether to deport him on account of his conviction although, on being advised that he had lodged an application with the European Court in 2008, they said that they would defer that decision.

Law – Article 8: Leaving aside the question whether the applicant – a young adult who had not yet founded his own family – could be deemed to enjoy "family life" with his mother, with whom he lived, the deportation order had in any event interfered with his right to respect for his private life. The proposed deportation pursued the legitimate aim of the "prevention of disorder or crime". The domestic authorities had taken all relevant factors – including the seriousness of the offence and the fact that the applicant was a minor at the time of its commission – into account when deciding on the applicant's deportation and their decision at the time had been within their margin of appreciation. However, the last domestic decision dated back to 2007 and no further assessment of the proportionality of the applicant's deportation had taken place since. The immigration authorities appeared not to have taken any steps to deport the applicant since the conclusion of those proceedings, even though no interim measures preventing his deportation had been sought. When assessing the compatibility of deportation with the Convention, the Court had to consider the situation at the date of the actual deportation, not of the final deportation order, and, where deportation was intended to satisfy the aim of preventing disorder or crime, the period of time which had passed since the commission of the offence and the applicant's conduct throughout that period were particularly significant. During that period, the applicant had not committed any further offences and the risk of his doing so had been assessed as low. He had taken advantage of the educational opportunities available in detention and had continued his education after his release, eventually obtaining a postgraduate degree and finding stable employment. In fact, the Government had not pointed to any concern regarding the applicant's conduct in the seven years that had elapsed since his release and in deciding to expel him had relied only on the seriousness of the offence. Given the applicant's exemplary conduct and commendable efforts to rehabilitate himself and reintegrate into society over that period, the Government had failed to provide sufficient support for their contention that the applicant could reasonably be expected to cause disorder or engage in criminal activities such as to render his deportation necessary in a democratic society.

Conclusion: deportation would constitute violation (unanimously).

Article 41: No claim made in respect of damage.

Positive obligations

Failure to effectively apply criminal-law mechanisms to protect child from sexual abuse: *violation*

M. and C. v. Romania - 29032/04
Judgment 27.9.2011 [Section III]

(See Article 3 above, page 7)

ARTICLE 10

Freedom of expression

Dismissal of trade-union members for publishing articles offending their colleagues: *no violation*

Palomo Sánchez and Others v. Spain - 28955/06 et al.
Judgment 12.9.2011 [GC]

Facts – The applicants worked as delivery men for a company. After having brought several sets of proceedings before employment tribunals against their employer, in 2001 they set up a trade union and were members of its executive committee. The March 2002 issue of the union's monthly newsletter reported on a judgment of an employment tribunal which had partly upheld their claims. The cover page of the newsletter displayed a cartoon showing two employees of the company giving sexual gratification to the director of human resources. The employees were criticised in two articles, worded in vulgar language, for having testified in favour of the company during the proceedings brought by the applicants. The newsletter was distributed among the workers and displayed on the trade union's notice board on the company's premises. The applicants were dismissed for serious misconduct, namely for impugning the reputations of the two employees and the human resources director targeted in the newsletter. The applicants challenged that decision before the courts. The Employment Tribunal dismissed their complaints, finding that the dismissals were justified under the relevant provisions of the Labour Regulations. It held that the cartoon and the two articles were offensive and impugned the dignity of those concerned, and thus exceeded the limits of freedom of expression. Subsequent appeals by the applicants were unsuccessful.

In a judgment of 8 December 2009 (see Information Note no. 130, the case then being called *Aguilera Sánchez v. Spain*, no. 28389/06 et al.), a Chamber of the Court found, by six votes to one, that there had been no violation of Article 10 of the Convention.

Law – Article 10 read in the light of Article 11: In the applicants' case the question of freedom of expression was closely related to that of freedom of association in a trade-union context. It was to be noted in this connection that the protection of personal opinions under Article 10 was one of the objectives of freedom of assembly and association as enshrined in Article 11. However, even though the complaint mainly concerned the applicants' dismissal for having, as members of the executive committee of a trade union, published and displayed the material in question, the Court found it more appropriate to examine the facts under Article 10, nevertheless read in the light of Article 11, on the ground that it had not been established that the applicants' trade union membership had played a decisive role in their dismissal.

The principal question was whether the respondent State was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The domestic courts had noted that freedom of expression in the context of labour relations was not unlimited, the specific features of those relations having to be taken into account. To arrive at the conclusion that the cartoon and articles had been offensive to the people concerned, the employment tribunal had carried out a detailed analysis of the facts at issue and the context in which the applicants had published the newsletter. The Court saw no reason to call into question the domestic courts' findings that the content of the newsletter had been offensive and capable of harming the reputation of others. A clear distinction had to be made between criticism and insult and the latter might, in principle, justify sanctions. Accordingly, the grounds given by the domestic courts had been consistent with the legitimate aim of protecting the reputation of the individuals targeted by the cartoon and articles in question, and the conclusion that the applicants had overstepped the limits of admissible criticism in labour relations could not be regarded as unfounded or devoid of a reasonable basis in fact.

As to whether the sanction imposed on the applicants, namely their dismissal, was proportionate to the degree of seriousness of the content in question, the cartoon and articles had been published in the newsletter of the trade union workplace branch to which the applicants belonged, in the context of a dispute between them and the

company. However, they included criticisms and accusations which were aimed not directly at the company but at two other employees and the human resources manager. The extent of acceptable criticism was narrower as regards private individuals than as regards politicians or civil servants acting in the exercise of their duties.

The Court did not share the Government's view that the content of the articles in question did not concern any matter of general interest. They had been published in the context of a labour dispute inside the company, to which the applicants had presented certain demands. The debate had therefore not been a purely private one; it had at least been a matter of general interest for the workers of the company. However, such a matter could not justify the use of offensive cartoons or expressions, even in the context of labour relations. The remarks had not been instantaneous and ill-considered reactions in the context of a rapid and spontaneous oral exchange, but written assertions, displayed publicly on the premises of the company. After a detailed balancing of the competing interests, with extensive reference to the Constitutional Court's case-law concerning the right to freedom of expression in labour relations, the domestic courts had endorsed the sanctions imposed by the employer and had found that the conduct in question had not directly fallen within the applicants' trade union activity but offended against the principle of good faith in labour relations. The Court agreed with the domestic courts that in order to be fruitful, labour relations had to be based on mutual trust. While that requirement did not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests, certain manifestations of the right to freedom of expression that might be legitimate in other contexts were not legitimate in that of labour relations. An attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment was, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying harsh sanctions.

In those circumstances, the applicants' dismissal had not been a manifestly disproportionate or excessive sanction requiring the State to afford redress by annulling it or replacing it with a more lenient measure.

Conclusion: no violation (twelve votes to five).

Restrictions on postal distribution of magazines: *inadmissible*

Verein gegen Tierfabriken v. Switzerland - 48703/08
Decision 20.9.2011 [Section V]

Facts – The applicant association, according to its articles of association, carries out political activities to promote animal welfare and consumer rights by campaigning during elections and referendums. It also publishes a magazine two or three times a year in various regions of Switzerland, with articles and photographs concerning the treatment of animals in agriculture. In a letter of April 2007 the Swiss Post Office informed the applicant association that its magazines would no longer be delivered to all households, but only to those which had not placed a sticker with the message "No advertising please" on their letterboxes. The reason given was that only "official" items, for example material sent by political parties and items of a non-commercial nature meeting a public-information requirement, could be delivered to all letterboxes. In May 2007 the applicant association lodged a complaint with a commercial court, which found against it. It then lodged a civil-law appeal against that decision with the Federal Court, which dismissed the appeal in August 2008.

Law – Article 10: The Court considered it appropriate to examine whether there had been a violation of Article 10 from the standpoint of whether the Swiss authorities had been under a positive obligation to ensure that the applicant association's magazine was delivered by the Post Office to letterboxes displaying a "No advertising please" sticker.

The parties concerned, namely the applicant association and the Swiss Post Office, had been acting as private commercial partners. The conditions applicable to the delivery of publications had been clearly set out in the *PromoPost* brochure and formed an integral part of the service on offer to anyone considering this delivery method. The Swiss authorities had had a certain margin of appreciation in assessing whether there was a "pressing social need" to refuse to deliver the applicant association's magazine to letterboxes displaying the sticker in question. With regard to the applicant association's interest in circulating its ideas, it was clear that the association's activities, namely animal welfare and environmental protection, were a matter of considerable public interest. At the same time, the measure complained of by the applicant association had

merely concerned the delivery of its magazine to letterboxes displaying the sticker. According to the association, the sticker was to be found on one in two letterboxes. The impact of the refusal to deliver the magazine was therefore significantly limited. Moreover, there had been no question of banning the magazine or monitoring its contents. Nor had the applicant association been prevented from distributing the magazine by its own means. In that connection, the commercial court had pointed out that other distribution systems were available, offering services with comparable rates and conditions. The applicant association had likewise not been prevented from imparting its ideas via other channels, for example on its Internet site. It was also important to protect consumers and residents from unsolicited mail. Thus, as the Federal Court had noted, the criteria laid down by the Post Office had been devised following complaints from certain customers and reflected the wishes of those who displayed the sticker in question on their letterboxes. Furthermore, the applicant association's case had been examined by the domestic courts at two levels which had given due consideration to its arguments. Their decisions had contained persuasive reasoning and had been based on legal provisions that were accessible, foreseeable and very detailed. In particular, the courts had given sufficient reasons for their finding that the applicant association's magazine should not be regarded as emanating from a "political party" within the meaning of the *PromoPost* brochure or as belonging to any other category of "official delivery". The same was true of the finding that the magazine in question, which was published two or three times a year, could not be regarded as a free newspaper either, seeing that it was not distributed sufficiently regularly. Accordingly, the scrutiny performed by the two domestic courts had been thorough, relevant and sufficient for the purposes of Article 10, particularly with a view to avoiding any arbitrary treatment of the applicant association.

In view of the foregoing, and even assuming that Switzerland bore responsibility for the measure in question, the Court considered that, regard being had to the national authorities' margin of appreciation in the present case and to the domestic courts' decisions, which had been very detailed with a basis in law, the respondent State had not failed to comply with its positive obligation to protect the applicant association's freedom of expression.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible the complaint under Article 14 in conjunction with Article 10.

ARTICLE 11

Freedom of association

Disciplinary sanctions found to infringe trade-union freedom: *violation*

Şişman and Others v. Turkey - 1305/05
Judgment 27.9.2011 [Section II]

Facts – The applicants were civil servants working for tax offices attached to the Ministry of Finance and were board members of the local section of a trade union affiliated to the Trade Union Confederation of Public-Sector Employees. In May 2004 disciplinary proceedings were instituted against them for putting up posters encouraging participation in the annual 1 May workers' demonstration on their own office walls, rather than on the notice board set aside for that purpose. The tax offices that employed them gave them a reprimand on the ground that posters displayed in areas other than the designated notice board were forbidden and constituted "visual pollution". Deductions were subsequently made from their salaries on account of the reprimand. After noticing that other posters were on display elsewhere on office walls, the applicants appealed, arguing that they had been punished not for unauthorised posting but because the posters concerned trade-union activities. They further alleged that this amounted to intimidation against the trade union, since the measures taken against them were likely to have a negative impact on their career. In July 2004 the tax offices upheld the measures but downgraded the reprimands to warnings.

Law – Article 11: The measure complained of amounted to interference with the applicants' right to freedom of association. The warnings they had been given were prescribed by the Civil Servants Act. The Court doubted that the interference in the present case had pursued a legitimate aim. However, it considered it unnecessary to determine that question, in view of its conclusion regarding the necessity of the interference. The applicants had been given warnings as disciplinary penalties for putting up on their own office walls posters produced by their trade union, to celebrate International Workers' Day on 1 May. Even assuming that the tax offices had made a notice board available to them for trade-union

information, the applicants had not engaged in fly-posting causing visual pollution throughout their workplace. Their activities had been limited to the temporary use of their office walls to impart information to members of the union about the organisation of the event, which was viewed as a means of expressing solidarity among employees and of ensuring the full and independent exercise of their trade-union rights. In addition, bearing in mind the peaceful nature of the planned event, the posters in question had not contained any statements or illustrations that were illegal or shocking to the public. Regard being had to the important place of freedom of association in a democratic society, individuals did not enjoy that freedom if in reality the freedom of action or choice which remained available to them was either non-existent or so reduced as to be of no practical value. In the present case the sanction complained of, however minimal, was capable of deterring trade-union members from engaging freely in their activities. Accordingly, the warnings given to the applicants had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: The four applicants were awarded EUR 482 jointly in respect of pecuniary damage and EUR 1,000 each in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 8)

Refusal to take minor subject to immigration control into account when determining priority in entitlement to social housing:
no violation

Bah v. the United Kingdom - 56328/07
Judgment 27.9.2011 [Section IV]

Facts – The applicant, a Sierra Leonean national, was granted indefinite leave to remain in the United Kingdom in 2005. Her minor son was subsequently allowed to join her on condition that he did not have recourse to public funds. Shortly after his arrival, she applied to her local authority for assistance in finding accommodation after her private landlord informed her that her son could not stay in the room she was renting. The local authority agreed to assist but, because her son was subject to immigration control, refused to grant her the priority to which her status as an unintentionally homeless person with a minor child would ordinarily have entitled her.[1] It did, however, help her find private-sector accommodation outside the borough and some seventeen months later provided her with social housing within the borough. Neither she nor her son were homeless at any time. In her application to the European Court the applicant complained that the refusal to grant her priority had been discriminatory.

Law – Article 14 in conjunction with Article 8: The impugned legislation had obviously affected the home and family life of the applicant and her son, as it had impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The facts of the case therefore fell within the ambit of Article 8 and Article 14 was applicable.

The applicant's son had been granted entry to the United Kingdom on the express condition that he would not have recourse to public funds. The applicant's differential treatment under the housing legislation had thus resulted from her son's conditional immigration status, not his national origin. The fact that immigration status was a status conferred by law, rather than one which was inherent in the individual, did not preclude it from amounting to "other status" for the purposes of Article 14. However, given the element of choice involved in immigration status, the justification required for differential treatment based on that ground was not as weighty as in the case of a distinction based on inherent or immutable personal characteristics such as sex or race. Likewise, since the subject matter of the case – the provision of housing to those in need – was predominantly socio-economic in nature, the margin of appreciation accorded to the Government was relatively wide.

It was legitimate to put in place criteria for the allocation of limited resources such as social housing provided such criteria were not arbitrary or discriminatory. There had been nothing arbitrary in the denial of priority need to the applicant. By bringing her son into the United Kingdom in full awareness of the condition attached to his leave to

1. Section 9(2) of the Asylum and Immigration Act 1996, which was in force at the material time, provided that persons subject to immigration control were to be disregarded in determining whether another person had a priority need for accommodation.

enter, she had effectively agreed not to have recourse to public funds in order to support him. It was justifiable to differentiate between those who relied for priority-need status on a person who was in the United Kingdom unlawfully or on the condition that they had no recourse to public funds, and those who did not. The legislation pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants.

Without underestimating the anxiety the applicant must have suffered as a result of being threatened with homelessness, the Court observed that she had never in fact been homeless and that there were other statutory duties which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. In the event, she had been treated in much the same way as she would have been had she established a priority need: the local authority had helped find her a private-sector tenancy in another borough (owing to shortages within the borough) and had offered her social housing within the borough within seventeen months. The differential treatment to which the applicant was subjected had thus been reasonably and objectively justified.

Conclusion: no violation (unanimously).

ARTICLE 34

Hinder the exercise of the right of petition

Inadvertent but not irremediable failure to comply with interim measure indicated in respect of Article 8: *inadmissible*

Hamidovic v. Italy - 31956/05
Decision 13.9.2011 [Section II]

Facts – The applicant, a national of Bosnia and Herzegovina of Roma origin, was married in Rome in 1991 and had five children. A deportation order was made against her in July 2005 because she was living in Italy illegally. She was placed in a temporary holding centre. She lodged an application with the Court by fax on Friday 2 September 2005 and applied for protection under Rule 39 of the Rules of Court, alleging that her deportation would be violate her right to respect for her family life under Article 8 of the Convention. The same day the Court decided to apply Rule 39 and sent a fax at 6.36 p.m. to the Permanent Representation of Italy to the Council of Europe. By a fax of 6 September 2005 the applicant's representative informed the Registry of the Court that he had sent a fax to the holding centre at 1.08 p.m. on 5 September 2005, informing them that the Court was applying Rule 39 to the applicant. On 6 September 2005 the applicant was expelled to Bosnia and Herzegovina. On 8 September 2005 she filed a request with the Italian Ministry of the Interior for special authorisation to return to Italy. At the request of the Permanent Representation of Italy in Strasbourg, on 9 September 2005 the Ministry of the Interior sought clarification from the police headquarters in Rome regarding the transmission of the information concerning the application of the interim measure by the Court. They replied that because the relevant notice had not been flagged as urgent and no prior warning of it had been received, it had been processed as ordinary mail, which would explain the delay in the transmission of the information to the relevant services. The Italian Government then took steps to allow the applicant back into Italy, where she returned in November 2006. In March 2007 the deportation order was cancelled.

Law – Article 34: There had been a regrettable delay by the Permanent Representation of Italy in Strasbourg in sending the information concerning the application of Rule 39 to the Interior Ministry, notably during the morning of 5 September 2005, and subsequently on the part of the Ministry in forwarding it to the competent authorities. However, the lapse of time between the application of the interim measure and the applicant's deportation was relatively short – just one working day. In addition, regarding the transmission of the interim measure to the holding centre by the applicant's representative at 1.08 p.m. on Monday 5 September, the holding centre had no power to override the deportation order. Also, unlike in other cases, the fact that the Italian authorities had disregarded the Rule 39 measure did not lead to the loss of contact between the applicant and her counsel. Nor did it undermine the possibility for the Court to properly ascertain whether the applicant's right to respect for her private and family life had been affected. On the contrary, although attributable to a regrettable mistake on the part of the Government in its handling of the domestic procedure, the failure to act on the interim measure had no irreversible consequences that prevented the Court from duly proceeding with its examination of the application and

protecting the applicant from a potential violation of Article 8 of the Convention. Furthermore, the Government had immediately taken steps to elucidate the circumstances of the case and permit the applicant's return to Italy. Lastly, the risk to the applicant's Convention rights did not concern any of the "core" rights under the Convention, such as the right to life (Article 2) or the right not to be subjected to torture or inhuman treatment (Article 3).

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 35

Article 35 § 1

Six-month period

Calculation of time-limit when final day is not a working day: *case referred to the Grand Chamber*

Sabri Güneş v. Turkey - 27396/06
Judgment 24.5.2011 [Section II]

The *dies ad quem*, that is the day on which the six-month period expired, was a Sunday. The applicant therefore lodged his application with the European Court on the first working day thereafter, namely the Monday.

In a judgment of 24 May 2011 a Chamber of the Court noted, firstly, that the Government had not relied on failure to comply with the six-month period. However, that was a matter of public policy and the Court had jurisdiction to apply it of its own motion. It considered that the applicant could not be criticised for having lodged his application on the first working day following the Sunday, in accordance with domestic law and practice. Consequently, it was more consistent with the object and purpose of Article 35 to conclude that the six-month period should be extended to the first working day thereafter. The time-limit had therefore been complied with. Accordingly, the Court concluded, by five votes to two, that there had been a violation of Article 6 § 1.

On 15 September 2011 the case was referred to the Grand Chamber at the request of the Government.

Article 35 § 3 (a)

Competence *ratione personae*

Naming of street after public figure affiliated to the Nazis: *inadmissible*

L.Z. v. Slovakia - 27753/06
Decision 27.9.2011 [Section III]

Facts – The applicant was a Slovak national of Jewish origin who had been living in the Czech Republic since 1983. In 1993 the municipal council of a small village in northern Slovakia decided to name a street in the village after Jozef Tiso, who, according to official historical records, was the head of the Slovak State during the Second World War and had collaborated with Nazi Germany. In 1998 the applicant brought a civil claim requesting the quashing of the municipal council's decision as unconstitutional. His claim was dismissed by the domestic courts, which concluded that the name of a street in a village which was not the applicant's place of residence could hardly be seen as affecting his personal integrity.

Law – Article 8: The Court emphasised the importance of exercising vigilance towards fascist and other totalitarian movements and demonstrations of intolerance in democratic societies and noted the highly sensitive nature of the issues involved. It pointed out, however, that its task was to examine the impact of a specific situation on the applicant's Convention rights rather than to settle possible points of debate amongst historians. The Convention did not allow the bringing of an *actio popularis*, nor did it permit individuals to complain about public acts simply because they considered that they contravened the Convention. In order for the applicant to be considered a victim of a violation of a Convention right, he had to be able to show that he had been directly affected by the impugned measure. The applicant had argued that honouring Jozef Tiso had damaged Slovakia's reputation, which had inevitably affected the private lives of all of its citizens. His arguments were mainly oriented towards the general problem of the promotion of fascism and its potential consequences for society. However, he had no ties to the village at issue and had not lived in Slovakia since 1983. In fact, he had presented no evidence that the renaming of the street had had any negative effect on his private life. His complaint thus constituted an *actio popularis*.

Conclusion: inadmissible (incompatible *ratione personae*).

Article 35 § 3 (b)

No significant disadvantage

Domestic courts' refusal to examine claim lacking any basis under domestic law: *inadmissible*

Ladygin v. Russia - 35365/05
Decision 30.8.2011 [Section I]

Facts – After being ejected from a court waiting room by an usher for trying to jump a queue, the applicant sought to bring a claim for damages. The district court, however, declined jurisdiction on the grounds that the applicant's allegation that the usher had abused his powers was a matter for the prosecutor's office (which had, in fact, already established that the usher's actions were lawful). In his application to the European Court, the applicant complained that he had been denied access to court, contrary to Article 6 § 1 of the Convention.

Law – Article 35 § 3 (b): The complaint was considered in the light of the admissibility criteria introduced by Protocol No. 14 to the Convention, namely whether the applicant had suffered any significant disadvantage by the alleged breach, whether respect for human rights required examination of the case and whether the case had been duly considered by a domestic tribunal. On the first of these points the Court strongly doubted that the applicant was entitled under domestic law to bring a civil claim against the usher or, therefore, that his right of access to a court had been restricted in any way. However, even assuming it had been, there was nothing to suggest that any such limitation had had any serious adverse effect on his life. The applicant's subjective perception that he had not been treated fairly was insufficient to conclude that he had suffered a significant disadvantage. Such a subjective perception had to be justifiable on objective grounds, which did not exist in this instance. As to the second criterion, given the nature of the applicant's case, there were no compelling reasons to warrant its examination on the merits. Finally, as regards the third and final criterion, the notion "duly considered by a domestic tribunal" could not be interpreted as obliging the State to examine the merits of any claim brought before domestic courts no matter how frivolous. The applicant did not appear ever to have substantiated his claim or to have adduced any evidence that could arguably constitute a factual basis for his claim in damages. Accordingly, since the claim clearly had no basis in national law, the last criterion under Article 35 § 3 (b) was also satisfied.

Conclusion: inadmissible (no significant disadvantage).

Pecuniary damage claim in domestic proceedings amounting to EUR 500: *inadmissible*

Kiousi v. Greece - 52036/09
Decision 20.9.2011 [Section I]

Facts – By an action brought against the State in 2005, the applicant's husband had sought the sum of EUR 1,008 for pecuniary damage and EUR 1,000 for non-pecuniary damage, the total amount claimed being EUR 2,008. Upon his death, the case was pursued by his son and his wife. In 2010 the applicant's action was finally rejected as inadmissible on account of the fact that her husband had failed to refer his claim to the Public Accounting Department first. Before the Court, the applicant complained of the length of the proceedings.

Law – Article 35 § 3 (b): The Court first sought to assess what was at stake in the dispute financially. In order to do so, it took account of the amount claimed in respect of pecuniary damage and not the amount claimed in respect of non-pecuniary damage. Claims based on pecuniary damage indicated the applicant's financial loss and reflected what was actually at stake, unlike the amount claimed by way of non-pecuniary damage which was freely estimated by the applicant on the basis of personal conjecture. The financial stakes of the dispute had been relatively low (namely EUR 504, the maximum amount that could have been awarded to the applicant). Nothing in the case file indicated that the applicant's financial situation had been such that the outcome of the dispute would have had a significant impact on her personal life. The Court then determined whether there was clear and extensive case-law on the Convention issue raised in the instant case. Given that on numerous occasions it had examined cases involving the excessive length of proceedings before the Greek administrative courts,[1] it could not be maintained that the application raised any serious issues relating to the application or interpretation

1. See, among other authorities, the pilot judgment in the case of *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010, Information Note no. 136.

of the Convention, or any important issues of domestic law. Lastly, the Court noted that the action pursued by the applicant had been declared inadmissible on account of non-compliance with procedural rules. In the Court's view, that situation did not constitute a denial of justice attributable to the judicial authorities. In short, the applicant had not suffered a "significant disadvantage" in the exercise of her right to have her case heard within a reasonable time.

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 1 OF PROTOCOL No. 1

Positive obligations

Lack of adequate procedures to protect shareholders from fraudulent takeover of their company: *violation*

Shesti Mai Engineering OOD and Others v. Bulgaria - 17854/04
Judgment 20.9.2011 [Section IV]

Facts – The applicants held almost 50% of the shares in a limited liability company MTFU. In 1999 a city-court judge, acting on her own initiative, acceded to a request by the representative of a third-party company to enter the names of five members of a new board of directors in the register of companies. Several days later, the new management took control of MTFU's premises evicting by force the former management. It called and conducted two general meetings of MTFU's shareholders to which the applicants were denied access and which were attended by only 8% of MTFU's share capital. The meetings resolved to cancel all existing shares and issue a new share register from which the applicants' names were omitted. The applicants then issued court proceedings seeking to have the city-court judge's decision and all corresponding entries in the register of companies set aside. Their application was ultimately granted in 2003. Meanwhile, the new MTFU management had increased the company's share capital by more than twenty times without the applicants being allowed to subscribe for any of the new shares.

Law – Article 1 of Protocol No. 1: The Court reiterated that in certain situations the effective enjoyment of property rights might entail the adoption of positive measures by the State, even in cases involving litigation between private individuals. In this connection, the States were under an obligation to afford judicial recourse offering the necessary procedural guarantees and enabling the domestic courts to adjudicate effectively and fairly on any disputes between private persons. In the applicants' case the chain of events leading to the dilution of their shareholding in MTFU had been triggered by the city-court judge's decision to enter new members of the board of directors in the register of companies. The decision had been taken on the judge's own initiative without any resolution by the company's bodies and had grossly distorted the rules of procedure. The consequences for the applicants had therefore been linked to the actions of the State to a degree sufficient to justify the conclusion that the authorities had interfered with the applicants' property rights. The applicants had almost immediately sought the annulment of that decision, but to no avail. Their claims, even though of the utmost urgency, were examined under the normal court procedure, which had lasted for over four years. During that time the applicants had had no effective means of opposing the multitude of steps that had been taken by the new management or to prevent damage to their shareholdings. The precariousness and blatant unlawfulness of the situation caused by the judge's decision had called for the availability of urgent measures to prevent potentially irrevocable harm to the applicants' interests, but the procedures available under Bulgarian law had failed to provide effective redress to the applicants or to give them adequate protection from the consequences of the registration decision that had enabled private persons to fraudulently take control of their company.

Conclusion: violation (unanimously).

Article 41: Awards ranging between EUR 500 and 12,100 in respect of pecuniary damage and between EUR 4,000 and 6,000 in respect of non-pecuniary damage.

Deprivation of property

Compensation significantly lower than current cadastral value of land expropriated following restoration of Latvian independence: *case referred to the Grand Chamber*

Vistiņš and Perepjolkins v. Latvia - 71243/01
Judgment 8.3.2011 [Section III]

The applicants were given land by persons who had recovered ownership in the context of

denationalisation in the early 1990s. Although the value of the land indicated at the time of the gift was low, it increased substantially in 1996 following the land's inclusion within the perimeter of the Port of Riga. In 1997 legislation was introduced allowing land within that perimeter to be expropriated, with a ceiling on compensation based on the cadastral value in 1940 multiplied by a conversion coefficient which resulted in a value significantly lower than the estimated value. In subsequent court proceedings, the applicants were awarded rent arrears for use of their land since 1994, but refused an order cancelling the registration of the State's ownership.

In a judgment of 8 March 2011 (see Information Note no. 139), a Chamber of the Court held, by six votes to one, that there had been no violation of Article 1 of Protocol No. 1 to the Convention. While the difference between the current cadastral value of the land and the compensation obtained by the applicants had been disproportionate in the extreme, the substantial increase in the value of the land had resulted from objective factors to which neither the applicants nor the former owners had contributed. The applicants had acquired the land free of charge and owned it for only three years, without making any investments or paying any related taxes. In those circumstances, and given the considerations of equity and general policy, the Latvian authorities had been justified in not reimbursing the full cadastral or market value. The applicants had received significant amounts in respect of rent arrears and easements calculated on the basis of the current value of the land and so had profited from a "windfall effect". If the situation was considered as a whole, the amounts paid in respect of compensation did not appear disproportionate. The burden on the applicants was thus neither disproportionate nor excessive. The Chamber also held, unanimously, that there had been no violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

On 15 September 2011 the case was referred to the Grand Chamber at the applicants' request.

Control of the use of property

Uncompromising execution of tax debts and disproportionate bailiffs' fees resulting in major company's demise: *violation*

OAO Neftyanaya Kompaniya Yukos v. Russia - 14902/04
Judgment 20.9.2011 [Section I]

Facts – The applicant was an oil company and one of Russia's largest and most successful businesses. In late 2002 it became the subject of a series of tax audits and proceedings and was subsequently found guilty of repeated tax fraud, in particular for using an illegal tax-evasion scheme involving the creation of sham companies in the years 2000-03. In April 2004 proceedings were started against it in respect of the 2000 tax year. The same month the authorities also brought enforcement proceedings, as a result of which its Russian assets were attached, its domestic bank accounts partly frozen and the shares of its Russian subsidiaries seized. In May 2004 it was ordered by a commercial court to pay vast sums in taxes, interest and penalties. Its ordinary and cassation appeals were dismissed in June and July 2004 and it was denied supervisory review following a ruling by the Constitutional Court on 14 July 2005 concerning the starting point for the three-year limitation period in cases where a taxpayer had impeded the tax investigation. The applicant company later received reassessments in respect of the years 2001-03 with higher penalties as it was deemed to have committed repeat offences. Following a Ministry of Justice announcement in July 2004, almost 80% of the applicant company's shares in its main (and most valuable) production subsidiary were auctioned off in December 2004 to cover the tax liabilities. It was required to pay all the amounts due within very tight deadlines and its numerous requests for extensions of time to pay were rejected. It was also required to pay the bailiffs a flat-rate enforcement fee of 7% of the total debt. The applicant company was declared insolvent in August 2006 and liquidated in November 2007.

In its application to the European Court, the applicant company complained, inter alia, of the unlawfulness and lack of proportionality of the 2000-03 tax assessments and their subsequent enforcement.

Law – Article 1 of Protocol No. 1

(a) *Prosecution for alleged tax evasion in 2000* – The applicant company had argued that it had wrongly been prevented by the Constitutional Court's decision of 14 July 2005 from benefiting from the statutory three-year time-bar normally applicable to prosecutions for tax evasion.

Finding that the 2000 tax-assessment proceedings had been criminal in character, the Court reiterated that only law could define a crime and its corresponding penalty and that laws had to be accessible and foreseeable. The Constitutional Court's decision had changed the rules applicable

at the relevant time by creating an exception from a rule to which there had been no previous exceptions. That exception represented a reversal and departure from the well-established practice directions of the Supreme Commercial Court when there had been no indication of any divergent practice or previous difficulty in connection with the application of the relevant provision. Accordingly, notwithstanding the State's margin of appreciation, there had been a violation of the lawfulness requirement on account of the change in interpretation of the applicable rules. Further, since the applicant company's conviction in the 2000 tax-assessment proceedings had laid the basis for finding it liable to a 100% increase in the amount of the penalties due in respect of the 2001 tax assessment for a repeat offence, the doubling of the fine in respect of that year was not in accordance with the law either.

Conclusion: violation (four votes to three).

(b) *Additional tax liability under the tax assessments 2000-03* – The applicant company had complained in essence that the "tax optimisation techniques" it had allegedly lawfully used in 2000-03 had subsequently been condemned by the domestic courts without a satisfactory legal basis and in breach of established practice, with the result that it had been subjected to additional tax liability for those years.

The Court noted that the domestic courts' findings that the company's tax arrangements were unlawful at the time the company had used them were neither arbitrary nor manifestly unreasonable. The relevant provisions of the domestic law were also sufficiently accessible, precise and foreseeable as it was clear under the applicable rules that commercial contractual arrangements were only valid in so far as the parties were acting in good faith and that the tax authorities had broad powers to verify the parties' conduct and contest the legal characterisation of the arrangements made. Regard being had to the State's margin of appreciation and the fact that the applicant company was a large business holding which could have been expected to have recourse to professional advice, there had existed a sufficiently clear legal basis for the tax assessments. The assessments had pursued a legitimate aim (securing the payment of taxes) and were proportionate, as the rates of tax were not particularly high and there was nothing to suggest, given the gravity of the company's actions, that the rates of the fines or interest had imposed an individual or disproportionate burden on it.

Conclusion: no violation (unanimously).

(c) *Enforcement proceedings* – The seizure of the applicant company's assets, the imposition of a 7% enforcement fee and the forced sale of the company's main production unit had interfered with its rights under Article 1 of Protocol No. 1. The enforcement proceedings, which it was appropriate to analyse in their entirety as one continuous event, fell within the third rule of Article 1 of Protocol No. 1 which allows the member States to control the use of property in accordance with the general interest by enforcing "such laws as [they] deem necessary to secure the payment of taxes or other contributions or penalties". There was no reason to doubt that throughout the proceedings the actions of the various authorities involved had had a lawful basis and the legal provisions in question were sufficiently precise and clear to meet the Convention standards concerning the quality of law. The only remaining question was whether the enforcement measures were proportionate to the legitimate aim pursued.

Given the paramount importance of those measures to the applicant company's future and notwithstanding the Government's wide margin of appreciation in this field, the authorities had had an obligation to take careful and explicit account of all relevant factors in the enforcement process. Such factors included the character and amount of the company's existing and potential debts; the nature of its business and the relative weight of the company in the domestic economy; the company's current and probable economic situation and the assessment of its capacity to survive the enforcement proceedings; the economic and social implications of various enforcement options on the company and the various categories of stakeholders; the attitude of the company's management and owners and the conduct of the company during the enforcement proceedings, including the merits of any offers it may have made in connection with the enforcement.

Although the domestic authorities had examined and made findings in respect of some of these factors, they had not made an explicit assessment in respect of all of them. In particular, they had not considered in any detail possible alternative enforcement measures when it was rather obvious that the decision to make the company's main production unit the first item to be auctioned was capable of dealing a fatal blow to its ability to survive. While the bailiffs' obligation to follow the domestic legislation may have limited their options, they had nevertheless retained a decisive freedom of choice that could have made the difference

between the company's staying afloat or its eventual demise. Thus, although the overall amount of the company's indebtedness meant that the decision to sell off its main production unit was not entirely unreasonable, the authorities should nevertheless have given very serious consideration to other options, especially those that could have mitigated the damage to the company's structure, before definitively selecting for sale the asset that was its only hope of survival. This was particularly so in view of the fact that all the company's domestic assets had been attached by previous court orders and were readily available.

The company's situation had also been seriously affected by the 7% enforcement fee which had added over RUB 43 billion (EUR 1.16 billion) to its debts. The fee could not be suspended or rescheduled and had to be paid even before the company could begin to pay the main debt. The authorities had apparently refused to reduce it. While the Court could accept that there was nothing wrong in principle with requiring a debtor to pay expenses relating to enforcement or to threaten a debtor with a sanction to incite voluntary payment, the flat-rate fee payable in the applicant company's case had been out of all proportion to the bailiffs' actual enforcement expenses and, because of its rigid application, had contributed very seriously to the applicant company's demise.

Lastly, the authorities had been unyieldingly inflexible as to the pace of the enforcement proceedings, acting very swiftly and constantly refusing to concede to the applicant company's demands for additional time.

In sum, given the pace of the enforcement proceedings, the obligation to pay the full enforcement fee and their failure to take proper account of the consequences of their actions, the domestic authorities had failed to strike a fair balance between the legitimate aims sought and the measures employed.

Conclusion: violation (five votes to two).

The Court also found violations of Article 6 §§ 1 and 3 (b) in respect of the 2000 tax-assessment proceedings on the grounds that the applicant company had not had sufficient time to study the case file at first instance (four days for at least 43,000 pages) or to make submissions and, more generally, to prepare the appeal hearings. It found no violations in respect of the applicant company's other complaints under Article 6 § 1. It held that there had been no violation of Article 14 in conjunction with Article 1 of Protocol No. 1 as, in view of the considerable complexity of the tax arrangements it had put in place, the applicant company was not in a relevantly similar position to any other company. Lastly, there had been no violation of Article 18 in conjunction with Article 1 of Protocol No. 1, as the applicant company had failed to substantiate its claims that the authorities' aim had not been to take legitimate action to counter tax evasion, but to destroy it and take control of its assets.

Article 41: Reserved.

ARTICLE 2 OF PROTOCOL No. 1

Respect for parents' religious and philosophical convictions

Refusal to exempt children from sex-education classes and other school events which parents considered contrary to their religious convictions: *inadmissible*

Dojan and Others v. Germany - 319/08 et al.
Decision 13.9.2011 [Section V]

Facts – The applicants, members of the Christian Evangelical Baptist Church with strong moral beliefs, had children who attended a local public primary school. Mandatory sex-education classes formed part of the school curriculum in the fourth year of primary school. In 2006 the school decided to hold two-day theatre workshops at regular intervals for third- and fourth-grade children, in order to raise awareness of the problem of sexual abuse of children. Finally, it was a school tradition to organise an annual carnival celebration. Students were offered swimming classes or exercise in the gym as an alternative activity if they did not wish to attend the carnival. The applicants prevented their children participating in some or all of the above activities and, as a result, were fined for an administrative offence, which, in the case of two parents who failed to pay, was later converted to a prison sentence.

Law – Article 2 of Protocol No. 1: The second sentence of Article 2 of Protocol No. 1 aimed at safeguarding the possibility of pluralism in education, a possibility which was essential for the preservation of democratic society. It imposed a broad duty on the States to respect parents' religious and philosophical convictions throughout the State-education system. However, the setting and

planning of the curriculum in public schools in principle fell within the competence of the States and the solutions adopted might legitimately vary according to the country and the era. In fact, many subjects taught in school could, to a greater or a lesser extent, have some philosophical complexion or implications and the same was true of religious affinities. The second sentence of Article 2 of Protocol No. 1 required the States, in fulfilling the functions assumed by them with regard to education, to ensure that the information or knowledge included in the curriculum was conveyed in an objective, critical and pluralistic manner and to avoid indoctrination that might be considered as not respecting parents' religious and philosophical convictions. Such an interpretation was consistent with Articles 8 and 10 of the Convention as well as with the general spirit of the Convention.

The sex-education classes at issue aimed at neutral transmission of knowledge regarding procreation, contraception, pregnancy and child birth in accordance with the underlying legal provisions and the ensuing guidelines and curriculum, based on current scientific and educational standards. The goal of the theatre workshop was to raise awareness of sexual violence and abuse of children and was consonant with the principles of pluralism and objectivity embodied in Article 2 of Protocol No. 1. As regards the carnival celebration, the Court observed that it had not been accompanied by any religious activities and that alternative events had been offered for those who did not wish to attend. There was no indication that the information or knowledge imparted at any of the events complained of was not conveyed in an objective, critical and pluralistic manner. In refusing exemption from the compulsory sex-education classes, theatre workshop and carnival celebration, the national authorities had not overstepped their margin of appreciation. Moreover, the applicants had remained free to educate their children after school in conformity with their religious beliefs. Finally, the means employed with a view to compelling the applicants to ensure their children's attendance at the events at issue had not been disproportionate. Even though two parents had been given a prison sentence in default, the Court considered it solely a means of enforcing their payment obligation that had been imposed in accordance with the relevant provisions of domestic law.

Conclusion: inadmissible (manifestly ill-founded).

RULE 43 § 4 OF THE RULES OF COURT

Costs on striking out of application

Recovery of translation costs

Youssef v. the Netherlands - 11936/08
Decision 27.9.2011 [Section III]

Facts – The applicants were Syrian nationals who had lodged various complaints with the European Court after unsuccessfully applying for asylum in the Netherlands. The Government later informed the Court that the situation had been reviewed and the applicants granted residence permits. The latter's application to the Court was therefore struck out of the list under Article 37, except for a complaint under Article 6 which was declared inadmissible. The question then arose as to whether the applicants were entitled to an award under Rule 43 § 4 of the Rules of Court[1] in respect of costs incurred in translating their submissions to the Court from Dutch into English, one of the Court's two official languages.

Law – Rule 43 § 4 of the Rules of Court: Under the Rules of Court, prior to notice of an application being given to a Government applicants could lodge their submissions in any of the official languages of the Contracting Parties. Even though submissions in English or French of good linguistic quality certainly assisted the Court in its work, translation costs made at that stage of the proceedings could not be said to have been "necessarily incurred". As regards the translation of submissions after notice of the application had been given, the position was that, while translations had evidently to be of good quality, there was no requirement that they be certified or produced by a sworn translator. The applicants were therefore awarded costs relating to the translation of the submissions lodged after notice of the application was given to the Government except in so far as they related to the inadmissible Article 6 complaint.

1. Rule 43 § 4 provides: "When an application has been struck out, the costs shall be at the discretion of the Court. ...".

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

Sabri Güneş v. Turkey - 27396/06
Judgment 24.5.2011 [Section II]

(See Article 35 § 1 above, page 20)

Vistiņš and Perepjolkins v. Latvia - 71243/01
Judgment 8.3.2011 [Section III]

(See Article 1 of Protocol No. 1 above, page 22)

RECENT PUBLICATIONS

1. Recent Court publications

Two new translations have been added to the Court's catalogue of publications in non-official languages:

• The Italian edition of the *Practical Guide on Admissibility Criteria* is now available on the Court's website, courtesy of the Italian Ministry of Justice.

Guida pratica sulla ricevibilità

• The Turkish edition of the *Handbook on European Non-Discrimination Law* has now been published under a partnership between the Court and the Justice and Legal Co-operation Department of the Directorate General of Human Rights and Rule of Law at the Council of Europe.

Avrupa Ayrımcılık Yasağı Hukuku El Kitabı

A new report by the Research Division of the Court Registry has also just been released on "The use of Council of Europe treaties in the case-law of the European Court of Human Rights". This report is available at the following address: www.echr.coe.int (Case-law/Case-law analysis/Research reports).

2. Cumulative Index to the Case-Law Information Notes 2011

To facilitate access to materials in the Information Notes, a running cumulative index for the current year has been prepared and will be updated online with each new edition of the provisional version of the Note. The important cases summarised in the Information Notes are indexed by Convention Article, keyword, applicant name and respondent State, with hyperlinks both to the relevant edition of the Information Note and to the judgment or decision concerned.

The index covers the period January to September 2011 and is available on the Court's website through the Hudoc database.

3. Survey of the screening of applications by the Court

Some 95% of applications to the Court are declared inadmissible. Taking this finding as a starting point, the authors and researchers involved in this project have sought to shed light on one of the less well-known aspects of the Strasbourg jurisprudence: the question of admissibility. By providing analysis (complete with the most recent case-law) of all the admissibility criteria affecting an application from the date it is lodged to the date it is processed, and of certain national characteristics (in more than a dozen of the High Contracting States), this book provides a comprehensive survey of the screening of applications by the Court that complements the *Practical Guide on Admissibility Criteria*.

This 567-page survey, which is available only in French, is entitled *Quel filtrage des requêtes par la Cour européenne des droits de l'homme ?* and was compiled under the direction of Pascal Dourneau-Josette, Head of Division at the Registry of the Court, and Elisabeth Lambert Abdelgawad, Research Director at the *Centre national de la recherche scientifique* (University of Strasbourg). It can be purchased for EUR 39 (USD 78) from Council of Europe Publishing: http://book.coe.int.