Institutul Național al Justiției

**NORLAM**
The Norwegian Mission of Rule of Law
Advisers to Moldova
The Norwegian Ministry of Justice and the Police
The Norwegian Ministry of Foreign Affairs

# SEMINAR

## „THE RIGHT TO RESPECT FOR FAMILY AND PRIVATE LIFE. THE PROTECTION OF PROPERTY. EVIDENCE AND MEANS OF EVIDENCE. PRACTICAL ASPECTS OF UNIFYING THE LEGAL PRACTICE"

**Participants:** judges
**Organizers:** NIJ in cooperation with NORLAM
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**Chişinău, str. S.Lazo 1**

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**THE RIGHT TO RESPECT FOR FAMILY AND PRIVATE LIFE. THE PROTECTION OF PROPERTY. EVIDENCE AND MEANS OF EVIDENCE. PRACTICAL ASPECTS OF UNIFYING THE LEGAL PRACTICE**

## SOURCES:

***CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS***

[…]

**Article 8 – Right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 9 – Freedom of thought, conscience and religion**

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

**Article 10 – Freedom of expression**

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

**Article 11 – Freedom of assembly and association**

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

**Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[…]

## PROTOCOL 1. ENFORCEMENT OF CERTAIN RIGHTS AND FREEDOMS NOT INCLUDED IN SECTION I OF THE CONVENTION

### 1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention

The Governments signatory hereto, being Members of the Council of Europe,
Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as 'the Convention'),
Have agreed as follows:

**ARTICLE 1**
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

**ARTICLE 2**
No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

**ARTICLE 3**
The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

**ARTICLE 4**
Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

**ARTICLE 5**
As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the convention and all the provisions of the Convention shall apply accordingly.

**ARTICLE 6**
This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all the Members of the names of those who have ratified.

**Done at Paris on the 20th day of March 1952, In English and French, both text being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments**

## Article 8. RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

**CASE OF UZUN v. GERMANY**
*(Application no. 35623/05)*
JUDGMENT STRASBOURG 2 September 2010

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Mönchengladbach.

**A. Background to the case**

6. In spring 1993 the North Rhine-Westphalia Department for the Protection of the Constitution (*Verfassungsschutz*) started a long-term observation of the applicant. The latter was suspected of participation in offences committed by the so-called Anti-Imperialist Cell (*Antiimperialistische Zelle*), an organisation which was pursuing the armed combat abandoned since 1992 by the Red Army Fraction (*Rote Armee Fraktion*), a left-wing extremist terrorist movement.

7. As a consequence, the applicant was occasionally kept under visual surveillance by staff members of the Department for the Protection of the Constitution and the entries to his flats were filmed by video cameras. The Department also intercepted the telephones in the house in which the applicant lived with his mother (from 26 April 1993 to 4 April 1996) and in a telephone box situated nearby (from 11 January 1995 until 25 February 1996). Moreover, post addressed to him was opened and checked (from 29 April 1993 to 29 March 1996).

8. Likewise, S., a presumed accomplice of the applicant, was subjected to surveillance measures from 1993. ……

9. In October 1995 the Federal Public Prosecutor General instituted investigatory proceedings against the applicant and S. for participation in bomb attacks for which the Anti-Imperialist Cell had claimed responsibility. The Federal Office for Criminal Investigations was in charge of the investigations.

11. In October 1995 the Federal Office for Criminal Investigations further installed two transmitters (*Peilsender*) in S.'s car, which the applicant and S. often used together. However, the applicant and S. detected and destroyed the transmitters. As they suspected that their telecommunications were being intercepted and that they were being observed, they never spoke to each other on the phone and succeeded on many occasions in evading visual surveillance by the investigation authorities.

12. In view of this, the Federal Office for Criminal Investigation built a Global Positioning System (GPS) receiver into S.'s car in December 1995 by order of the Federal Public Prosecutor General. Thereby it could determine the location and the speed of the car once per minute. However, the data were only recovered every other day in order to prevent detection of the receiver. This observation lasted until the applicant's and S.'s arrest on 25 February 1996.

13. GPS is a radio navigation system working with the help of satellites. It allows the continuous location, without lapse of time, of objects equipped with a GPS receiver anywhere on earth, with a maximum tolerance of 50 metres at the time. It does not comprise any visual or acoustical surveillance. As opposed to transmitters, its use does not necessitate the knowledge of where approximately the person to be located can be found.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that his observation via GPS and its aggregation with several further measures of surveillance, as well as the use of the data obtained thereby in the criminal proceedings against him, had breached his right to respect for his private life as provided in Article 8 of the Convention […]

34. The Government contested that argument.

*2. The Court's assessment*

38. The Court notes, as regards the scope of the case before it, that the applicant complained under Article 8 about his observation via GPS. He argued that this measure, taken alone, was in breach of his right to respect for his private life and that in any event it breached Article 8 because of its aggregation with several further measures of surveillance. He further complained about the use of the data collected thereby in the criminal proceedings against him. The applicant did not contest the lawfulness of any of the additional surveillance measures other than the GPS surveillance. The Court observes that the applicant brought his complaint as defined above before the Düsseldorf Court of Appeal, the Federal Court of Justice and the Federal Constitutional Court, which all addressed and rejected it on the merits (see paragraphs 14, 18-22 and 23-28 respectively). Consequently, the Government's objection of non-exhaustion of domestic remedies must be dismissed.

39. As to the question whether the applicant may claim to be the victim of a breach of his right to respect for his private life for the purposes of Article 34 of the Convention in view of the fact that it was not himself, but his accomplice's car which had been subjected to surveillance via GPS, the Court considers that this issue is closely linked to the substance of his complaint under Article 8. It therefore joins the preliminary objection raised by the Government in this respect to the merits of the case.

40. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

*. Recapitulation of the relevant principles*

43. The Court reiterates that private life is a broad term not susceptible to exhaustive definition. Article 8 protects, *inter alia*, a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX; *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I; and *Perry v. the United Kingdom*, no. 63737/00, § 36, ECHR 2003-IX (extracts)).

44. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor (see *Perry*, cited above, § 37). A person walking along the street will inevitably be visible to any member of the public who is also present. Monitoring by technological means of the same

public scene (for example, a security guard viewing through closed-circuit television) is of a similar character……

45. Further elements which the Court has taken into account in this respect include the question whether there has been compilation of data on a particular individual, whether there has been processing or use of personal data or whether there has been publication of the material concerned in a manner or degree beyond that normally foreseeable.

46. Thus, the Court has considered that the systematic collection and storing of data by security services on particular individuals, even without the use of covert surveillance methods, constituted an interference with these persons' private lives […]

47. The Court has further taken into consideration whether the impugned measure amounted to a processing or use of personal data of a nature to constitute an interference with respect for private life (see, in particular, *Perry*, cited above, §§ 40-41). Thus, it considered, for instance, the permanent recording of footage deliberately taken of the applicant at a police station by a security camera and its use in a video identification procedure as the processing of personal data about the applicant interfering with his right to respect for private life (ibid., §§ 39-43). Likewise, the covert and permanent recording of the applicants' voices at a police station for further analysis as voice samples directly relevant for identifying these persons in the context of other personal data was regarded as the processing of personal data about them amounting to an interference with their private lives (see *P.G. and J.H. v. the United Kingdom*, cited above, §§ 59-60; and *Perry*, cited above, § 38).

48. Finally, the publication of material obtained in public places in a manner or degree beyond that normally foreseeable may also bring recorded data or material within the scope of Article 8 § 1 (see *Peck*, cited above, §§ 60-63, concerning disclosure to the media for broadcast use of video footage of the applicant taken in a public place; and *Perry*, cited above, § 38).

*ii. Application of these principles to the present case*

49. In determining whether the surveillance via GPS carried out by the investigation authorities interfered with the applicant's right to respect for his private life, the Court, having regard to the above principles, will determine first whether this measure constituted a compilation of data on the applicant. It notes the Government's argument that this was not the case, given that the GPS receiver had been built into an object (a car) belonging to a third person (the applicant's accomplice). However, in doing so, the investigating authorities clearly intended to obtain information on the movements of both the applicant and his accomplice as they had been aware from their previous investigations that both suspects had been using S.'s car together on the weekends of previous bomb attacks (see paragraphs 11 and 17 above; see also, *mutatis mutandis*, *Lambert v. France*, 24 August 1998, § 21, *Reports of Judgments and Decisions* 1998-V, where it was considered irrelevant to the finding of an interference with the applicant's private life that the telephone tapping in question had been carried out on the line of a third party).

50. Moreover, the fact that the applicant must, just as S. was, be considered to have been the subject of the surveillance by GPS, is not in question, because information on the movements of S.'s car could only be linked to the applicant by additional visual surveillance to confirm his presence in that car. Indeed, none of the domestic courts expressed any doubts that the applicant had been subjected to surveillance via GPS (see, in particular, paragraphs 14, 17, 20 and 26 above).

51. The Court further notes that by the surveillance of the applicant via GPS, the investigation authorities, for some three months, systematically collected and stored data determining, in the circumstances, the applicant's whereabouts and movements in the public sphere. They further recorded the personal data and used it in order to draw up a pattern of the applicant's movements, to make further investigations and to collect additional evidence at the places the applicant had travelled to, which was later used at the criminal trial against the applicant (see paragraph 17 above).

52. In the Court's view, GPS surveillance is by its very nature to be distinguished from other methods of visual or acoustical surveillance which are, as a rule, more susceptible of interfering with a person's right to respect for private life, because they disclose more information on a person's conduct, opinions or feelings. Having regard to the principles established in its case-law, it nevertheless finds the above-mentioned factors sufficient to conclude that the applicant's observation via GPS, in the circumstances, and the processing and use of the data obtained thereby in the manner described above amounted to an interference with his private life as protected by Article 8 § 1.

53. Consequently, the Government's preliminary objection that the applicant may not claim to be the victim of a breach of his right to respect for his private life for the purposes of Article 34 of the Convention must equally be dismissed.

*2. Whether the interference was justified*

**a. Was the interference "in accordance with the law"?**

*ii. The Court's assessment*

α. Relevant principles

60. Under the Court's case-law, the expression "in accordance with the law" within the meaning of Article 8 § 2 requires, firstly, that the measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring it to be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law (see, among other authorities, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A; *Lambert*, cited above, § 23; and *Perry*, cited above, § 45).

61. As to the requirement of legal "foreseeability" in this field, the Court reiterates that in the context of covert measures of surveillance, the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any such ……...In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise, especially as the technology available for use is continually becoming more sophisticated

[…]

63. In addition, in the context of secret measures of surveillance by public authorities, because of the lack of public scrutiny and the risk of misuse of power, compatibility with the rule of law requires that domestic law provides adequate protection against arbitrary interference with Article 8 rights. ……

The Court must be satisfied that there exist adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law […].

β. Application of those principles to the present case

68. The Court considers that it was clear from the wording of Article 100c § 1 no. 1 (b), read in the context of Article 100c § 1 no. 1 (a) and no. 2, that the technical means at issue covered methods of surveillance which were neither visual nor acoustical and were used, in particular, "to detect the perpetrator's whereabouts". As the use of GPS does not constitute either visual or acoustical surveillance and allows the location of objects equipped with a GPS receiver and thus of persons travelling with or in those objects, the Court finds that the domestic courts' finding that such surveillance was covered by Article 100c § 1 no. 1 (b) was a reasonably foreseeable development and clarification of the said provision of the Code of Criminal Procedure by judicial interpretation.

69. ……. However, the Court is satisfied that the duration of such a surveillance measure was subject to its proportionality in the circumstances and that the domestic courts reviewed the respect of the proportionality principle in this respect (see for an example paragraph 28 above). It finds that German law therefore provided sufficient guarantees against abuse on that account.

70. As to the grounds required for ordering a person's surveillance via GPS, the Court notes that under Article 100c § 1 no. 1 (b), § 2 of the Code of Criminal Procedure, such surveillance could only be ordered against a person suspected of a criminal offence of considerable gravity or, in very limited circumstances, against a third person suspected of being in contact with the accused, and if other means of detecting the whereabouts of the accused had less prospect of success or were more difficult. It finds that domestic law thus set quite strict standards for authorising the surveillance measure at issue.

71. The Court further observes that under domestic law the prosecution was able to order a suspect's surveillance via GPS, which was carried out by the police. It notes that in the applicant's submission, only conferring the power to order GPS surveillance on an investigating judge would have offered sufficient protection against arbitrariness. The Court observes that pursuant to Article 163f § 4 of the Code of Criminal Procedure, which entered into force after the applicant's surveillance via GPS had been carried out, systematic surveillance of a suspect for a period exceeding one month did indeed have to be ordered by a judge. It welcomes this reinforcement of the protection of the right of a suspect to respect for his private life. It notes, however, that already, under the provisions in force at the relevant time, surveillance of a subject via GPS has not been removed from judicial control. In subsequent criminal proceedings against the person concerned, the criminal courts could review the legality of such a measure of surveillance and, in the event that the measure was found to be unlawful, had discretion to exclude the evidence obtained thereby from use at the trial (such a review was also carried out in the present case, see, in particular, paragraphs 14, 19 and 21 above).

72. The Court considers that such judicial review and the possibility to exclude evidence obtained from an illegal GPS surveillance constituted an important safeguard, as it discouraged the investigating authorities from collecting evidence by unlawful means. In view of the fact that GPS surveillance must be considered to interfere less with a person's private life than, for instance, telephone tapping (an order for which has to be made by an independent body both under domestic law (see Article 100b § 1 of the Code of Criminal Procedure, paragraph 30 above) and under Article 8 of the Convention (see, in particular, *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, §§ 70-71, 26 April 2007, and *Iordachi and Others*, cited above, § 40), the Court finds subsequent judicial review of a person's surveillance by GPS to offer sufficient protection against arbitrariness. Moreover, Article 101 § 1 of the Code of Criminal Procedure contained a further safeguard against abuse in that it ordered that the person concerned be informed of the surveillance measure he or she had been subjected to under certain circumstances (see paragraph 31 above).

73. The Court finally does not overlook that under the Code of Criminal Procedure, it was not necessary for a court to authorise and supervise surveillance via GPS which was carried out in addition to other means of surveillance and thus all surveillance measures in their entirety. It takes the view that sufficient safeguards against abuse require, in particular, that uncoordinated investigation measures taken by different authorities must be prevented and that, therefore, the prosecution, prior to ordering a suspect's surveillance via GPS, had to make sure that it was aware of further surveillance measures already in place. However, having also regard to the findings of the Federal Constitutional Court on this issue (see paragraph 27 above), it finds that at the relevant time the safeguards in place to prevent a person's total surveillance, including the principle of proportionality, were sufficient to prevent abuse.

74. In view of the foregoing, the Court considers that the interference with the applicant's right to respect for his private life was “in accordance with the law” within the meaning of Article 8 § 2.

[…]

**C.S v Romania**

*(Application no. 26692/05)*

JUDGMENT STRASBOURG 20 March 2012

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, son and father, were born in 1990 and 1954 respectively and currently live in Iasi.

### A. The alleged rape and violence inflicted on the first applicant

#### *1. Applicants' version of the abuse*

7. From January 1998 to April 1998, the first applicant, who was then a seven year-old boy, was allegedly subjected to repeated rape and violence by P.E.

8. In January 1998, the child was followed home from school by P.E. In front of the applicant's family's apartment, P.E. grabbed the key from his hand, opened the door and forcefully pushed the boy inside. He hit the child several times in the stomach. He pulled the applicant's clothes off and tied his hands and legs and gagged him with strips of white cloth that he had taken out of his trouser pocket. Then P.E. dragged the boy into the kitchen, removed a piece of furniture from against the wall and placed it near the couch. He bent the child over the furniture and sexually abused him. He then removed the gag and forced the child into oral sex. P.E. hit the applicant again several times in the stomach, head and genitalia, untied him and told him to put his clothes on. He threatened the child with a knife and warned him that he would kill him if anyone found out what had happened.

9. The first applicant was too scared to scream during the assault.

10. The abuse continued during the following months, several times per week. At a certain point, P.E. made a copy of the applicant's key so he could enter the apartment. Sometimes he would wait for the child inside, sometimes he came with a dog and once with other persons, including two minor children. Before leaving the apartment, P.E. sometimes stole food and small sums of money.

11. Eventually the applicant told his brother and father about what was happening to him.

12. After the events the first applicant changed school and in October 2005 the family finally moved from Bacău to Iaşi, following the advice of the school psychologist.

*2. The Government's position*

13. The Government did not contest the description of the facts by the first applicant.

**B. Criminal investigations into the allegations of rape and violence**

*1. Police investigations*

14. On 27 April and 4 May 1998 on behalf of his son, the second applicant reported the sexual abuse and violence inflicted on the child to the Bacău Police. He accused P.E., S.P. and L.I.D. He reiterated his complaints on 18 and 28 May, 4, 8 and 9 June and on 19 July 1998.

15. The police started investigating the case.

16. On 18 May 1998, at the request of the investigators, the first applicant underwent a medical examination at the Bacău Clinic. The record noted:

> "... healing anal lesion and hypotonia of the anal sphincter. No signs of violence on the body ... The lesions necessitate 16-18 days of medical care and could have been caused by anal intercourse."

A medical certificate issued on 19 May 1998 at the request of the police, summarised the findings of the examination.

17. On 12, 15 and 29 June 1998 P.E. gave statements to the police. He claimed that he had not been in the area during that period, and that he did not know the applicants' family. He had only been in the building once, on New Year's Eve, for approximately ten minutes. He admitted that he used to take his sister's dog out for a walk but he had not done so in a while; during the time in question he had been training a similar dog, in the afternoons, from 5 p.m. to 7 p.m. During a polygraph test, P.E. showed simulated behaviour when asked whether he had had sexual intercourse with the first applicant.

S.P. and L.I.D. denied any participation in the abuse.

18. The first applicant was interviewed several times by the investigators. He gave details about the facts. His statements were recorded on 19 June 1998, 12 October 2001, 31 May 2002 and 25 March 2003. In some of the interviews he declared that he had told his brother and father about the abuse, but in others he stated that he had not mentioned anything to anyone. In his first statement he also told the police that the day after he had told his father about the abuse, his parents had allowed him to return on his own from school and he had remained alone in the apartment after school.

19. The second applicant gave statements to the investigators, relating the facts as his son had described them.

20. On 15 December 1999 the first applicant's mother declared that she had suspected something was going on as her son's voice on the phone had sometimes been trembling and as she had sometimes found the house untidy and litter in the bathroom, but that she had thought the children were responsible. Before the prosecutor she supplemented her statements and stated that during that time she had noticed that food and money had disappeared from the house.

21. The first applicant identified P.E. in a line up at the police headquarters.

22. Several other witnesses were interviewed by the police, including neighbours and acquaintances.

R.M., the neighbour from upstairs, stated that she had no knowledge of what had happened in the applicants' home. A few days later she changed her statements and declared that she had seen a man who fitted P.E.'s description entering the applicants' apartment with a dog during the period in question. She explained that she had been afraid that if she talked about what she had seen, the neighbours would have thought she had been spying on them. During the investigations and court proceedings R.M. changed her statements, claiming both to have seen P.E. entering the victim's apartment several times, between February and March, and to have seen him entering only once.

23. On 10 January 2000 the police confronted R.M. and P.E. They both maintained their previous statements.

24. B.V. informed the police that at the second applicant's request, he had followed the applicant to school and home a few times in April 1998. He had noticed P.E. in the vicinity several times, and on 22 April 1998 had seen him forcing the first applicant into the apartment.

R.I., R.M.'s adolescent son, stated that he had seen P.E. entering the victim's home from January to April, sometimes with a dog. On 27 June 1998 the police organised a confrontation between R.I. and P.E. R.I. maintained that he had seen P.E. entering the apartment with the victim and then had heard the child scream. P.E. denied having seen R.I. or having abused the first applicant.

25. The investigators also searched the applicants' and P.E.'s homes, but found no further evidence to support the accusations. They checked the record of calls made from the applicants' telephone during the period under investigation. They also checked and confirmed that the upstairs neighbours could see, from the hallway, who entered the applicants' apartment.

26. During the investigations the first applicant underwent several medical and psychiatric evaluations in the presence of his father.

27. On 1 February 2000 a new medical examination by the Bacău Laboratory of Forensic Medicine, ordered by the police, confirmed the findings of the expert examination of 18 May 1998. The doctors considered that it was impossible to tell whether the perpetrator had been an adult or a minor. They concluded that the lesions could only have been caused by repeated sexual abuse.

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*3. Complaints about the investigations*

36. Throughout the investigation and prosecution, the second applicant complained several times about the length of the proceedings. His complaints were dismissed by the Prosecutor's Office attached to the Bacău District Court on 16 August 1999 and 29 February 2000. On 12 July 2002 the Bacău County Police answered a similar complaint, outlining the latest procedural steps taken in the case.

37. In addition, on 22 November 2001 the second applicant complained that he, his family and some of the witnesses had received threats from P.E. On 8 November 2004 P.E. threatened the applicants with retaliation. They reported the incidents to the police.

38. On 20 April 2004 the second applicant complained about the prosecutor's decision not to prosecute S.P. and L.I.D. On 21 May 2004 the Bacău District Court dismissed the complaint. The decision became final as the parties did not appeal against it.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

### *2. The Court's appreciation*

#### **(a) General principles**

68. The Court reiterates that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII).

69. Furthermore, the absence of any direct State responsibility for acts of violence that meet the condition of severity such as to engage Article 3 of the Convention does not absolve the State from all obligations under this provision. In such cases, Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals (see *M.C.*, cited above, § 151, and *Denis Vasilyev v. Russia*, no. 32704/04, §§ 98-99, 17 December 2009).

70. Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official investigation are similar. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation (see *Denis Vasilyev*, cited above, § 100 with further references; and *Stoica v. Romania*, no. 42722/02, § 67, 4 March 2008).

71. Furthermore, positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against serious acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *M.C.*, cited above, § 150).

72. The Court reiterates that it has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *M.C.,* cited above, § 152).

Lastly, the Court notes that the United Nations Committee on the Rights of the Child has emphasised that a series of measures must be put in place so as to protect children from all forms of violence which includes prevention, redress and reparation (see paragraphs 52-53 above).

**(b) Application of those principles to the case under examination**

73. On the facts of the case, the Court notes at the outset that the acts of violence suffered by the first applicant and not contested by the Government undoubtedly meet the threshold of Article 3. The State's positive obligations were thus called into action.

74. The Court notes with concern that despite the gravity of the allegations and the particular vulnerability of the victim, the investigations did not start promptly. Indeed, it took the authorities three weeks from the date the complaint had been lodged, to order the medical examination of the victim and almost two months to question the main suspect. The investigation took five years and the applicants' repeated complaints about its length were unsuccessful. The County Court acknowledged the significant lapse of time, but drew no inference from it.

Furthermore, the Court notes that for almost three years no significant investigative steps were taken after the prosecutor's first decision not to prosecute (16 June 2000), despite the repeated hierarchical instructions to continue the investigations.

75. At the end of the criminal proceedings, some seven years after the date of the alleged facts, the accused person was exonerated. Nothing in the file indicates that the authorities tried to find out if somebody else could be held criminally responsible for these serious crimes. This raises doubts as to the effectiveness of the proceedings, in particular in such a sensitive case as that involving the violent sexual abuse of a minor (see, *mutatis mutandis, Stoica*, cited above, § 77).

76. The Court has found no indication of arbitrariness in the way the courts classified the facts in law. Indeed, in application of the principle of the more lenient criminal law, the rape of male juveniles was not criminally punishable at the time, as males were not recognised as potential victims of rape until 15 November 2000 and as in 2001 Article 200, which prohibited sexual intercourse with a person of the same sex, including through coercion, was abolished (see paragraphs 49 and 50 above). Before the scope of the protection against rape was extended to potential male victims, the system allowed nevertheless for those acts to be reprimanded in the context of other crimes, such as the ones invoked in the case under examination.

The Court notes that the respondent State's legislation currently protects all persons, including male and female juveniles, against rape, including statutory rape. It also notes that Romania has ratified the CRC and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (see paragraphs 51-54 above) which provide obligations for the Member States to protect children against any form of abuse.

77. ……..In similar cases, the Court has expressed the opinion that it was for the authorities to explore all the facts and decide on the basis of an assessment of all the surrounding circumstances (see *M.C.*, cited above, § 181).

78. Notwithstanding its subsidiary role in the matter, the Court is particularly concerned that the authorities did not try to weigh up the conflicting evidence and made no consistent efforts to establish the facts by engaging in a context-sensitive assessment (see *M.C.*, cited above, § 177). The Court emphasises that investigation has to be rigorous and child-sensitive in case involving violence against a minor.

79. The Court cannot but note that while the authorities adopted a lax attitude concerning the length of the investigation, the domestic courts attached significant weight to the fact that

the family did not report the alleged crimes immediately to the police and that, to a certain extent, the victim did not react sooner (see paragraph 47 above).

80. The Government also evoked the parents' alleged negligence in spotting and reporting the abuse in good time. Even if - with hindsight - it might have been advisable for the parents to take prompt action when they noticed the first changes in the behaviour of the first applicant and the blood in his underpants, the Court fails to see how this could have had a major impact on the diligence of the police in their response to the reported facts. Neither can the Court understand why the domestic courts have attached such a significant weight to that fact.

81. Concerning notably the weight attached to the victim's reaction, the Court considers that the authorities were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors, particularities which could have explained the victim's hesitations both in reporting the abuse and in his descriptions of the facts (see *M.C.*, cited above, § 183).

82. The Court points out that the obligations incurred by the State under Articles 3 and 8 of the Convention in cases such as this require that the best interests of the child be respected. The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see, *mutatis mutandis, Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III). The Court regrets that the first applicant was never offered counselling and was not accompanied by a qualified psychologist during the proceedings or afterwards. The only mention of such support is from the school counsellor, who suggested that it would be better if the family moved away. Bearing in mind the positive obligations that the Respondent State has assumed under the various international instruments protecting the rights of child, this cannot be considered to constitute an adequate measure for "recovery and reintegration".

83. The failure to adequately respond to the allegations of child abuse in this case raises doubts as to the effectiveness of the system put in place by the State in accordance with its international obligations and leaves the criminal proceedings in the case devoid of meaning.

The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to meet their positive obligations to conduct an effective investigation into the allegations of violent sexual abuse and to ensure adequate protection of the first applicant's private and family life.

There has accordingly been a violation of Articles 3 and 8 of the Convention in respect of the first applicant.

**CASE OF GILLAN AND QUINTON v. THE UNITED KINGDOM**

*(Application no. 4158/05)*

JUDGMENT STRASBOURG 12 January 2010

## PROCEDURE

……

3. The applicants alleged that the powers of stop and search used against them by the police breached their rights under Articles 5, 8, 10 and 11 of the Convention.

……

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1977 and 1971 respectively and live in London.

### A. The searches

7. Between 9 and 12 September 2003 there was a Defence Systems and Equipment International Exhibition ("the arms fair") at the Excel Centre in Docklands, East London, which was the subject of protests and demonstrations.

8. At about 10.30 a.m. on 9 September 2003 the first applicant was riding a bicycle and carrying a rucksack near the arms fair, on his way to join the demonstration. He was stopped and searched by two police officers who told him he was being searched under section 44 of the Terrorism Act 2000 ("the 2000 Act": see paragraphs 28-34 below) for articles which could be used in connection with terrorism. He was handed a notice to that effect. The first applicant claimed he was told in response to his question as to why he was being stopped that it was because a lot of protesters were about and the police were concerned that they would cause trouble. Nothing incriminating was found (although computer printouts giving information about the demonstration were seized by the officers) and the first applicant was allowed to go on his way. He was detained for roughly 20 minutes.

9. At about 1.15 p.m. on 9 September 2003, the second applicant, wearing a photographer's jacket, carrying a small bag and holding a camera in her hand, was stopped close to the arms fair. She had apparently emerged from some bushes. The second applicant, a journalist, was in the area to film the protests. She was searched by a police officer from the Metropolitan Police notwithstanding that she showed her press cards to show who she was. She was told to stop filming. The police officer told her that she was using her powers under sections 44 and 45 of the 2000 Act. Nothing incriminating was found and the second applicant was allowed to go on her way. The record of her search showed she was stopped for five minutes but she thought it was more like thirty minutes. She claimed to have felt so intimidated and distressed that she did not feel able to return to the demonstration although it had been her intention to make a documentary or sell footage of it.

[…]

# THE LAW

……

49. The applicants complained that their being stopped and searched by the police under sections 44-47 of the 2000 Act gave rise to violations of their rights under Articles 5, 8, 10 and 11 of the Convention.

……

[…]

**B. Alleged violation of Article 8 of the Convention**

*1. Whether there was an interference with the applicants' Article 8 rights*

58. The Court will first consider whether the stop and search measures amounted to an interference with the applicants' right to respect for their private life

**a. The parties' submissions**

[…]

**b. The Court's assessment**

76. The Court recalls its well established case-law that the words "in accordance with the law" require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95 and 96, ECHR 2008-...).

77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise …… The level of precision required of domestic legislation– which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, for example, *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; *S. and Marper*, cited above, § 96).

78. It is not disputed that the power in question in the present case has a basis in domestic law, namely sections 44-47 of the 2000 Act (see paragraphs 28-34 above). In addition, the Code of Practice, which is a public document, sets out details of the manner in which the constable must carry out the search (see paragraphs 35-36 above).

79. The applicants, however, complain that these provisions confer an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. The House of Lords considered that this discretion was subject to effective control, and Lord Bingham identified eleven constraints on abuse of power (see paragraph 16 above). However, in the Court's view, the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.

80. The Court notes at the outset that the senior police officer referred to in section 44(4) of the Act is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he "considers it expedient for the prevention of acts of terrorism". However, "expedient" means no more than "advantageous" or "helpful". There is no requirement at the authorisation stage that the stop and search power be considered"necessary" and therefore no requirement of any assessment of the proportionality of the measure. The authorisation is subject to confirmation by the Secretary of State within 48 hours. The Secretary of State may not alter the geographical coverage of an authorisation and although he or she can refuse confirmation or substitute an earlier time of

expiry, it appears that in practice this has never been done. Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are *ultra vires* or an abuse of power.

81. The authorisation must be limited in time to 28 days, but it is renewable. It cannot extend beyond the boundary of the police force area and may be limited geographically within that boundary. However, many police force areas in the United Kingdom cover extensive regions with a concentrated populations. The Metropolitan Police Force Area, where the applicants were stopped and searched, extends to all of Greater London. The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed in a "rolling programme"since the powers were first granted (see paragraph 34 above).

82. An additional safeguard is provided by the Independent Reviewer (see paragraph 37 above). However, his powers are confined to reporting on the general operation of the statutory provisions and he has no right to cancel or alter authorisations, despite the fact that in every report from May 2006 onwards he has expressed the clear view that "section 44 could be used less and I expect it to be used less" (see paragraphs 38-43 above).

85. In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics (see paragraphs 43-44 above). There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention.

86. The Government argue that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.

87. In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore,"in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention.

[…]

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

**CASE OF SZULUK v. THE UNITED KINGDOM**

JUDGMENT STRASBOURG 2 June 2009

# PROCEDURE

……

3. The applicant alleged that the monitoring of his medical correspondence whilst he was in prison breached his right to respect for his correspondence and private life under Article 8 of the Convention.

……..

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and is currently in prison in Staffordshire.

### *1. The applicant's brain haemorrhage and initial confidentiality of his medical correspondence*

6. On 30 November 2001 the applicant was sentenced by a Crown Court to a total of fourteen years' imprisonment for conspiracy to supply Class A drugs and two offences of possession of a Class A drug with intent to supply.

7. On 6 April 2001, while on bail pending trial, the applicant suffered a brain haemorrhage for which he underwent surgery. On 5 July 2002 he underwent further surgery. Following his discharge back to prison, he required monitoring and was required to go to hospital every six months for a specialist check-up by a neuro-radiologist.

8. In 2002 the applicant was held in a high security prison which held category A (high risk) prisoners as well as category B prisoners such as himself. As a result, he fell within the provisions of a general order, Prison Service Order (PSO) 1000 which applied to all prisoners of whatever security category who were being "held in a unit which held category A prisoners" (see paragraph 28 below).

9. The applicant wished to correspond confidentially with his specialist to ensure that he would receive the necessary medical treatment and supervision in prison. He expressed his concerns about his medical correspondence with his external specialist being read and applied to the prison governor for a direction that such correspondence should be accorded confidentiality.

10. On 18 September 2002 the governor of the prison in which the applicant was being detained agreed to the applicant's request. It was decided that the applicant's medical correspondence would not be read provided certain conditions were met. All outgoing and incoming mail was to be marked "medical in confidence." Outgoing correspondence would be checked to ensure that it was being sent to a nominated address and incoming mail was to be marked with a distinctive stamp of the relevant health authority.

[…]

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained that the prison authorities had intercepted and monitored his medical correspondence in breach of Article 8 of the Convention […]

### B. Merits

*1. The parties' arguments*

…….

*2. The Court's assessment*

43. The Court notes that it is clear, and indeed not contested, that there was an "interference by a public authority" with the exercise of the applicant's right to respect for his correspondence guaranteed by Article 8 § 1. Such an interference will contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve them (see, among other authorities, *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, § 84, *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, § 34, *Petrov v. Bulgaria*, no. 15197/02, § 40, 22 May 2008 and *Savenkovas v. Lithuania*, no. 871/02, § 95, 18 November 2008).

44**.** It further observes that it is accepted by the parties that the reading of the applicant's correspondence was governed by law and that it was directed to the prevention of crime and the protection of the rights and freedoms of others (see paragraph 17 above). The issue that falls to be examined is whether the interference with the applicant's correspondence was "necessary in a democratic society".

45. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" regard may be had to the State's margin of appreciation (see, amongst other authorities, *Campbell*, cited above, § 44, *Petrov v. Bulgaria* § 44 cited above and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 77, ECHR 2007-). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.

46. In assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary"for one of the aims set out in Article 8 § 2, regard has to be paid to the ordinary and reasonable requirements of imprisonment. Some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention (see *Silver and Others*, cited above, § 98, *Kwiek v. Poland*, no. 51895/99, § 39, 30 May 2006 and *Ostrovar v. Moldova*, no. 35207/03, § 105, 13 September 2005, among other authorities). However, the Court has developed quite stringent standards as regards the confidentiality of prisoners' legal correspondence. In paragraph 43 of its judgment in the case of *Petrov v. Bulgaria* (cited above), the Court enunciated its principles as regards legal correspondence in the prison context as follows:

> "correspondence with lawyers ... is in principle privileged under Article 8 of the Convention and its routine scrutiny is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client (see Campbell, cited above, §§ 47 and 48). The prison authorities may open a letter from a lawyer to a prisoner solely when they have reasonable cause to believe

that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, such as opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause"will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication is being abused (see Campbell, cited above, § 48)."

47. In the present case, the interference took the form of the monitoring of the applicant's correspondence with his external specialist doctor, which concerned his life-threatening medical condition. The Court recalls the case of *Z. v. Finland*, judgment of 25 January 1997, *Reports of Judgments and Decisions* 1997–I, in which it emphasised that:

"the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.

Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health..."

48. Moreover, as the Court has recognised in its case-law under Article 3 of the Convention, notwithstanding the practical demands of imprisonment, detainees' health and well-being must be adequately served by, amongst other things, providing them with the requisite medical assistance (see in this regard, *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, § 79 and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). In this context, the Court refers also to the CPT's standards as regards the importance of medical confidentiality in the prison context (see paragraphs 34 and 35 above).

49. Turning to the facts of the case, the Court considers it significant that the applicant is suffering from a life-threatening condition for which he has required continuous specialist medical supervision by a neuro-radiologist since 2002. In this connection, it takes note of the Court of Appeal's recognition that the monitoring of the applicant's medical correspondence with his specialist, albeit limited to the prison medical officer, involved an "inescapable risk of abuse". It further notes that the Court of Appeal was careful not to exclude the possibility that in another case it might be disproportionate to refuse confidentiality to a prisoner's medical correspondence (see paragraph 19 above) and its acceptance that allowing the prison medical officer to read such correspondence might lead him to encounter criticism of his own performance, which in turn could create difficulties in respect of the applicant's prison life and treatment. It should not be overlooked that the prison medical officer, although a registered medical practitioner was, until the coming into force of section 25 (1) of the Offender Management Act 2007, a prison officer. This has now changed as all prison health-care is now provided by an external NHS general practitioner (GP) (see paragraph 23 above).

50. This being so, the Court notes the applicant's submission before the domestic courts and before this Court that the monitoring by the prison medical officer of his correspondence with his medical specialist inhibited their communication and prejudiced reassurance that he was receiving adequate medical treatment whilst in prison. Given the severity of the applicant's medical condition, the Court, like Mr Justice Collins upon hearing the applicant's claim for judicial review, finds the applicant's concerns and wish to check the quality of the treatment he was receiving in prison to be understandable.

51. On that account, the Court notes the observations of both Mr Justice Collins and the Court of Appeal that the prison governor's initial decision to grant the applicant's medical correspondence confidentiality indicated, or in the exact words of the Court of Appeal, "strongly suggested"that it "would be a perfectly reasonable course" (see paragraphs 15 and 17 above). It further takes into consideration the procedure that had been first established by the prison governor on 18 September 2002, whereby the applicant's medical correspondence would not be read provided that certain conditions were met (see paragraph 10 above). It is accepted that there were never any grounds to suggest that the applicant had ever abused the confidentiality afforded to his medical correspondence in the past or that he had any intention of doing so in the future. Furthermore, the Court considers it relevant that, although the applicant was detained in a high security prison which also held Category A (high risk prisoners), he was himself always defined as Category B (prisoners for whom the highest security conditions are not considered necessary, see paragraph 25 above).

52. Furthermore, the Court does not consider the Prison Service's arguments as to the general difficulties involved in facilitating confidential medical correspondence for prisoners (see paragraph 14 above) to be of particular relevance to this case. In the present case, the applicant only wished to correspond confidentially with one named medical specialist and the Court of Appeal accepted that her address and qualifications were easily verifiable. Moreover, the specialist in question appeared to have been willing and able to mark all correspondence with the applicant with a distinctive stamp, and had demonstrably done so prior to the prison governor's revision of his decision on 28 November 2002. The Court does not share the Court of Appeal's view that the risk that the applicant's medical specialist, whose *bona fides* was never challenged, might be "intimidated or tricked" into transmitting illicit messages was sufficient to justify the interference with the applicant's Article 8 rights in the exceptional circumstances of the present case. This is particularly so since the Court of Appeal further acknowledged that though the same risk was inherent in the case of secretarial staff of MPs (see paragraph 18 above), the importance of unimpeded correspondence with MPs outweighed that risk.

53. In light of the severity of the applicant's medical condition, the Court considers that uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP. In so finding, the Court refers to the Court of Appeal's concession that it might, in some cases, be disproportionate to refuse confidentiality to a prisoner's medical correspondence and the changes that have since been enacted to the relevant domestic law. The Court also has regard to the submissions of the applicant on this point, namely that the Government have failed to provide sufficient reasons why the risk of abuse involved in correspondence with named doctors whose exact address, qualifications and *bona fides* are not in question should be perceived as greater than the risk involved in correspondence with lawyers.

54. In view of the above, the Court finds that the monitoring of the applicant's medical correspondence, limited as it was to the prison medical officer, did not strike a fair balance with his right to respect for his correspondence in the circumstances.

55. There has accordingly been a violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 6,000 (six thousand euros) for costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into pounds sterling at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

*4. Dismisses* the remainder of the applicant's claim for just satisfaction.

**CASE OF M.C. v. BULGARIA**
*(Application no. 39272/98)*
JUDGMENT STRASBOURG 4 December 2003

******** ***Please, see attached as a separate document*** **********

**CASE OF PRETTY v. THE UNITED KINGDOM**
*(Application no. 2346/02)*
JUDGMENT STRASBOURG 29 April 2002

******** ***Please, see attached as a separate document*** **********

**CASE OF S.N. v. SWEDEN**
*(Application no. 34209/96)*
JUDGMENT STRASBOURG - 2 July 2002

******** ***Please, see attached as a separate document*** **********

**CASE OF ASCH v. AUSTRIA**
*(Application no. 12398/86)*

# AS TO THE FACTS

## I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Johann **Asch**, an Austrian national, resides at Laaben in **Austria**.

9. In the night of 5 to 6 July 1985 a dispute broke out between him and the woman he lived with, Mrs J.L. She left the house and took refuge at her mother's home.

The following morning she consulted a doctor. He sent her the same day to the St Pölten hospital then transmitted to that establishment a certificate dated 9 July attesting that she was suffering from multiple bruising and headaches. A report drawn up by the hospital, dated 11 July, stated that she claimed to have been struck with a belt and that she had several bruises on her body and one on her head.

10. In the evening of 6 July Mrs J.L. reported the incident to the Brand-Laaben police (Gendarmerie). She alleged that the applicant had threatened to use violence on her if she did not get out immediately. As she had refused to obey, he had hit her with a belt on her back, on her arms and on her legs. Seeing him seize a rifle, she had tried to reason with him and then taken advantage of a moment of calm to escape.

11. The police officer who had taken down this statement, Officer B., informed the public prosecutor's office of St Pölten by telephone the same evening; he was instructed by that office to file a report (anzeigen) concerning Mr **Asch**, but not to arrest him.

12. On the morning of 10 July Mrs J.L. went back to the Brand-Laaben police station to inform the relevant officers that she and the applicant had been reconciled and that she had returned to live with him on 7 July. She expressed her wish to withdraw her complaint.

13. Questioned at the police station in the evening, the applicant denied that he had ill-treated Mrs J.L. or threatened her with a rifle. She had, he claimed, only a scratch on her back; in addition, she had explained to him that she had lodged a complaint because she had been furious with him.

14. On 16 July 1985 the Brand-Laaben police sent a report on Mr **Asch** to the Neulengbach District Court. They substantially repeated the allegations made by Mrs J.L. and produced the medical certificate of 9 July, the hospital report of 11 July and the records of the statements of the applicant and his woman friend, of 6 and 10 July (see paragraphs 9-10 and 13 above).

15. On 7 August 1985 the St Pölten public prosecutor's office committed the applicant for trial before the Regional Court (Kreisgericht) of that town on charges of intimidation (Nötigung, Article 105 of the Criminal Code) and causing actual bodily harm (Körperverletzung, Article 83). At the hearing on 15 November 1985 Mr **Asch** protested his innocence; according to him, Mrs J.L. had hurt herself in the night of 5 to 6 July when she struck the end of the bed. However, he admitted having attacked her and having pushed her away from him.

16. When questioned by the court, Mrs J.L. availed herself of her right to refuse to give evidence (see paragraph 20 below). Subsequently Officer B. testified; he recounted the statements that she had made before him on 6 July 1985 and told the court that she had appeared to him to have been scared. She had shown to him the bruises on her arm and the bandage which covered a part of her back. No further applications being made by the parties, the judge ordered the report of 16 July, the interview record of 6 July 1985 (see paragraphs 10-11 and 14 above) and an extract from Mr **Asch**'s criminal record to be read out.

17. On 15 November 1985 the court convicted Mr **Asch** of intimidation and causing actual bodily harm and sentenced him to a fine of 80 schillings per day for 180 days. On the basis of the statements made at the hearing by the accused and by Officer B., the police investigation and the other evidence before it, the court found the facts to be established as described by Mrs J.L. on 6 July. According to the judgment, they were corroborated by the doctor's diagnosis. Moreover the evidence revealed Mr **Asch**'s irascible and unpredictable personality and thus made the version given by Mrs J.L. plausible. The court did not find credible the accused's claims that she had deliberately falsely accused him.

18. The applicant appealed. He complained inter alia that the first-instance court had had the record of Mrs J.L.'s statements (see paragraphs 10-11 above) read out at the hearing, without having asked him to comment on this document or having questioned him or Mrs J.L. He also asked the appeal court to order an expert medical opinion and to effect a search of the premises, as, he contended, the first-instance court ought to have done. In his view, the fact that Mrs J.L. had withdrawn her complaint had deprived the prosecution brought against him of its legal basis.

19. On 19 March 1986 the Court of Appeal (Oberlandesgericht) of Vienna upheld the contested judgment. It ruled inter alia that, according to well-established case-law, Article 252 par. 2 of the Code of Criminal Procedure (see paragraph 21 below) required the court before which the proceedings were pending to have the statements made outside court by witnesses who had refused to appear in court read out at the hearing, when such statements related to important points. The Court of Appeal also held that Mr **Asch** had failed to give sufficient reasons for his request for an expert opinion, since he had provided no evidence casting doubt on the cause of the victim's injuries.

### II. THE RELEVANT DOMESTIC LAW

20. Under Article 152 par. 1, sub-paragraph 1, of the Code of Criminal Procedure, the members of the accused's family as referred to in Article 72 of the Criminal Code are exempted from giving evidence; they include cohabitees.

21. Paragraphs 2 and 3 of Article 252 of the Code of Criminal Procedure are worded as follows:

> "2. The records of on-the-spot inspections and police reports, as well as the accused's criminal record and any other material documents or written evidence, shall be read out at the hearing, unless both parties agree to dispense with this proceeding.
>
> 3. After each such document has been read out, the accused shall be asked if he wishes to make any comments thereon."

## PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 12398/86) lodged with the Commission on 22 August 1986, Mr **Asch** complained that he had been convicted solely on the basis of the statements of Mrs J.L., who had not given evidence before the Regional Court; he relied on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

23. The Commission declared the application admissible on 10 July 1989. In its report of 3 April 1990 (Article 31) (art. 31), it expressed the opinion by twelve votes to five that there had been a violation of paragraph 1 of Article 6, taken together with paragraph 3 (d) (art. 6-1, art. 6-3-d) thereof. The full text of its opinion is reproduced as an annex to this judgment[*].

[…]

## Article 9. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

**CASE OF BUSCARINI AND OTHERS v. SAN MARINO**
**(application no. 24645/94)**
JUDGMENT Strasbourg, 18 February 1999

7. The applicants were elected to the General Grand Council (the parliament of the Republic of San Marino) in elections held on 30 May 1993.

8. Shortly afterwards, they requested permission from the Captains-Regent, who act as the heads of government in San Marino, to take the oath required by section 55 of the Elections Act (Law no. 36 of 1958) without making reference to any religious text. The Act in question referred to a decree of 27 June 1909, which laid down the wording of the oath to be taken by members of the Republic's parliament as follows:

"I, …, swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to uphold and defend freedom with all my might, ever to observe the Laws and Decrees, whether ancient, modern or yet to be enacted or issued and to nominate and vote for as candidates to the Judiciary and other Public Office only those whom I consider apt, loyal and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration."

9. In support of their request the applicants referred to Article 4 of the Declaration of Rights of 1974, which guarantees the right to freedom of religion, and Article 9 of the Convention.

39. The Court notes that at the hearing on 10 December 1998 the Government sought to demonstrate that the Republic of San Marino guaranteed freedom of religion; in support of that submission they cited its founding Statutes of 1600, its Declaration of Rights of 1974, its ratification of the European Convention in 1989 and a whole array of provisions of criminal law, family law, employment law and education law which prohibited any discrimination on the grounds of religion. It is not in doubt that, in general, San Marinese law guarantees freedom of conscience and religion. In the instant case, however, requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention.

As the Commission rightly stated in its report, it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs.

40. The limitation complained of accordingly cannot be regarded as "necessary in a democratic society". As to the Government's argument that the application ceased to have any purpose when Law no. 115/1993 was enacted, the Court notes that the oath in issue was taken before the passing of that legislation.

41. In the light of the foregoing, there has been a violation of Article 9 of the Convention.

**CASE OF 97 MEMBERS OF THE GLDANI CONGREGATION OF JEHOVAH'S WITNESSES AND 4 OTHERS v. GEORGIA**
*(Application no. 71156/01)*
JUDGMENT STRASBOURG 3 May 2007

******** ***Please, see attached as a separate document*** **********

**CASE OF METROPOLITAN CHURCH OF BESSARABIA AND OTHERS v. MOLDOVA**
*(Application no. 45701/99)*
JUDGMENT STRASBOURG 13 December 2001

128. The Government submitted that although the authorities had not recognised the applicant Church they acted in a spirit of tolerance and permitted it to continue its activities without hindrance. In particular, its members could meet, pray together and manage assets. As evidence, they cited the numerous activities of the applicant Church.

129. The Court notes that, under Law no. 979-XII of 24 March 1992, only religions recognised by a government decision may be practised in Moldova. In particular, only a recognised denomination has legal personality (section 24), may produce and sell specific liturgical objects (section 35) and engage clergy and employees (section 44). In addition, associations whose aims are wholly or partly religious are subject to the obligations arising from the legislation on religious denominations (section 21).

That being so, the Court notes that in the absence of recognition the applicant Church may neither organise itself nor operate. Lacking legal personality, it cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations.

As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned.

The Court further notes that on occasion the applicants have not been able to defend themselves against acts of intimidation, since the authorities have fallen back on the excuse that only legal activities are entitled to legal protection (see paragraphs 56, 57 and 84 above).

Lastly, it notes that when the authorities recognised other liturgical associations they did not apply the criteria which they used in order to refuse to recognise the applicant Church and that no justification has been put forward by the Government for this difference in treatment.

130. In conclusion, the Court considers that the refusal to recognise the applicant Church has such consequences for the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society, and that there has been a violation of Article 9 of the Convention.

**CASE OF LEYLA ŞAHİN v. TURKEY** *(Application no. 44774/98)*
JUDGMENT STRASBOURG 10 November 2005

14. The applicant was born in 1973 and has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

15. On 26 August 1997 the applicant, then in her fifth year at the Faculty of Medicine at Bursa University, enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University. She says she wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998.

17. On 12 March 1998, in accordance with the aforementioned circular, the applicant was denied access by invigilators to a written examination on oncology because she was wearing the Islamic headscarf. On 20 March 1998 the secretariat of the chair of orthopaedic traumatology refused to allow her to enrol because she was wearing a headscarf. On 16 April 1998 she was refused admission to a neurology lecture and on 10 June 1998 to a written examination on public health, again for the same reason.

28. In the meantime, on 16 September 1999, the applicant abandoned her studies in **Turkey** and enrolled at Vienna University, where she pursued her university education.

35. In **Turkey**, wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s. There has been extensive discussion on the issue and it continues to be the subject of lively debate in Turkish society. Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the başörtüsü (traditional Anatolian headscarf, worn loosely) and the türban (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam.

112. The interference in issue caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises was, according to the Turkish courts (see paragraphs 37, 39 and 41 above), based in particular on the two principles of secularism and equality.

113. In its judgment of 7 March 1989, the Constitutional Court stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role

of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one's religion could be restricted in order to defend those values and principles (see paragraph 39 above).

114. As the Chamber rightly stated (see paragraph 106 of its judgment), the Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in **Turkey**. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 93).

115. After examining the parties' submissions, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber (see paragraphs 107-09 of the Chamber judgment) as follows:

"... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women ... Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 37-38, § 78; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67; *Burgharz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 186, § 39 *in fine*; and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, p. 587, § 37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution ...

... In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above, and *Refah Partisi (the Welfare Party) and Others*, cited above, § 95), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in **Turkey** in recent years.

... The Court does not lose sight of the fact that there are extremist political movements in **Turkey** which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university."

116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish

to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

117. The Court must now determine whether in the instant case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.

118. Like the Chamber (see paragraph 111 of its judgment), the Grand Chamber notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises (see paragraph 47 above).

119. It should also be noted that, when the issue of whether students should be allowed to wear the Islamic headscarf surfaced at Istanbul University in 1994 in relation to the medical courses, the Vice-Chancellor reminded them of the reasons for the rules on dress. Arguing that calls for permission to wear the Islamic headscarf in all parts of the university premises were misconceived and pointing to the public-order constraints applicable to medical courses, he asked the students to abide by the rules, which were consistent with both the legislation and the case-law of the higher courts (see paragraphs 43-44 above).

120. Furthermore, the process whereby the regulations that led to the decision of 9 July 1998 were implemented took several years and was accompanied by a wide debate within Turkish society and the teaching profession (see paragraph 35 above). The two highest courts, the Supreme Administrative Court and the Constitutional Court, have managed to establish settled case-law on this issue (see paragraphs 37, 39 and 41 above). It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

121. In that connection, the Court does not accept the applicant's submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed (see paragraph 81 above). As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course (see, *mutatis mutandis*, *Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2325, § 32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (see *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see *Valsamis*, cited above, opinion of the Commission, p. 2337, § 51).

122. In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.

123. Consequently, there has been no breach of Article 9 of the Convention.

## Article 14. PROHIBITION OF DISCRIMINATION

**CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM"**
**v. BELGIUM (MERITS)**
*(Application n° 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64)*

******** ***Please, see attached as a separate document*** **********

**CASE OF ZARB ADAMI v. MALTA** *(Application no. 17209/02)*
JUDGMENT STRASBOURG 20 June 2006

******** ***Please, see attached as a separate document*** **********

**CASE OF THLIMMENOS v. GREECE** *(Application no. 34369/97)*
JUDGMENT STRASBOURG 6 April 2000

2. The case originated in an application (no. 34369/97) against the Hellenic Republic lodged with the Commission under former Article 25 of the Convention by a Greek national, Mr Iakovos **Thlimmenos** ("the applicant"), on 18 December 1996. The applicant alleged that the refusal of the authorities to appoint him to a post of chartered accountant on account of his criminal conviction for disobeying, because of his religious beliefs, the order to wear the military uniform was in breach of Articles 9 and 14 of the Convention and that the proceedings he had instituted in the Supreme Administrative Court in this connection were not conducted in accordance with Article 6 § 1 of the Convention. In his observations submitted on 20 October 1997 in reply to the observations of the Greek Government ("the Government") on the admissibility and merits of the case, he also complained of a violation of Article 1 of Protocol No. 1.

B. The Court's assessment

39. The Court considers that the applicant's complaint falls to be examined under Article 14 of the Convention taken in conjunction with Article 9 for the following reasons.

40. The Court recalls that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see the Inze v. Austria judgment of 28 October 1987, Series A no. 126, p. 17, § 36).

41. The Court notes that the applicant was not appointed a chartered accountant as a result of his past conviction for insubordination consisting in his refusal to wear the military uniform. He was thus treated differently from the other persons who had applied for that post on the ground of his status as a convicted person. The Court considers that such difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention.

42. However, the applicant does not complain of the distinction that the rules governing access to the profession make between convicted persons and others. His complaint rather concerns the fact that in the application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. In this context the Court notes that the applicant is a member of the Jehovah's Witnesses, a religious group committed to pacifism, and that there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion prevented him from doing so. In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated like any other person convicted of a serious crime although his own conviction resulted from the very exercise of this freedom. Seen in this perspective, the Court accepts that the "set of facts" complained of by the applicant – his being treated as a person convicted of a serious crime for the purposes of an appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs – "falls within the ambit of a Convention provision", namely Article 9.

43. In order to reach this conclusion, the Court, as opposed to the Commission, does not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 § 1. In particular, the Court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1.

44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see the Inze judgment cited above, p. 18, § 41). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

45. It follows that Article 14 of the Convention is of relevance to the applicant's complaint and applies in the circumstances of this case in conjunction with Article 9 thereof.

46. The next question to be addressed is whether Article 14 of the Convention has been complied with. According to its case-law, the Court will have to examine whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the Inze judgment cited above, ibid.).

47. The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. The Court takes note of the Government's argument that persons who refuse to serve their country must be appropriately punished. However, it also notes that the applicant did serve a prison sentence for his refusal to wear the military uniform. In these circumstances, the Court considers that imposing a further sanction on the applicant was

disproportionate. It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.

48. It is true that the authorities had no option under the law but to refuse to appoint the applicant a chartered accountant. However, contrary to what the Government's representative appeared to argue at the hearing, this cannot absolve the respondent State from responsibility under the Convention. The Court has never excluded that legislation may be found to be in direct breach of the Convention (see, *inter alia*, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III). In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.

49. The Court concludes, therefore, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 9.

IV. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

50. The applicant argued that both his initial conviction for insubordination and the authorities' resultant refusal to appoint him as a chartered accountant constituted interference with his right to manifest his religious beliefs under Article 9 of the Convention. The Commission's case-law to the effect that the Convention did not guarantee the right to conscientious objection to military service had to be reviewed in the light of present-day conditions. Virtually all Contracting States now recognised the right to alternative civilian service. Although the Court was admittedly not competent to examine the interference arising out of the applicant's initial conviction, the applicant submitted that the interference arising out of his non-appointment could not be deemed necessary in a democratic society.

51. The Government argued that the authorities' refusal to appoint the applicant did not constitute an interference with his right under Article 9 of the Convention. In any event, it was necessary in a democratic society. At the time when the applicant refused to serve in the armed forces, Greek law only recognised the possibility of unarmed military service because it was considered that giving everybody the right to alternative civilian service could give rise to abuses. As a result, the sanction imposed on him was not disproportionate and the rule excluding persons convicted of a serious crime from certain positions had to be applied without any distinctions.

52. The Commission did not consider it necessary to address the issue.

53. The Court considers that, since it has found a breach of Article 14 of the Convention taken in conjunction with Article 9 and for the reasons set out in paragraph 43 above, it is not necessary also to consider whether there has been a violation of Article 9 taken on its own.

**CASE OF KARNER v. AUSTRIA** *(Application no. 40016/98)*

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

**CASE OF E.B. v. FRANCE** *(Application no. 43546/02)*
STRASBOURG 22 January 2008
******** ***Please, see attached as a separate document*** **********

**CASE OF HOFFMANN v. AUSTRIA** *(Application no. 12875/87)*
JUDGMENT STRASBOURG 23 June 1993

A. Introduction

6. Mrs Ingrid Hoffmann is an Austrian citizen residing in Gaissau. She is a housewife.

7. In 1980 Mrs Hoffmann - then Miss Berger - married Mr S., a telephone technician. At that time, they were both Roman Catholics.

Two children were born to them, a son, Martin, in 1980 and a daughter, Sandra, in 1982. They were baptised as Roman Catholics.

8. The applicant left the Roman Catholic Church to become a Jehovah's Witness.

9. On 17 October 1983 the applicant instituted divorce proceedings against Mr S. She left him in August or September 1984 while the proceedings were still pending, taking the children with her.

The divorce was pronounced on 12 June 1986.

26. Mrs Hoffmann applied to the Commission on 20 February 1987. She complained that she had been denied custody of the children on the ground of her religious convictions. She

invoked her right to respect for her family life (Article 8 of the Convention) (art. 8), her right to freedom of religion (Article **9**) (art. **9**) and her right to ensure the education of her children in conformity with her own religious convictions (Article 2 of Protocol No. 1) (P1-2); she further claimed that she had been discriminated against on the ground of religion (Article 14) (art. 14).

It must first be determined whether the applicant can claim to have undergone different treatment.

32. In awarding parental rights - claimed by both parties - to the mother in preference to the father, the Innsbruck District Court and Regional Court had to deal with the question whether the applicant was fit to bear responsibility for the children's care and upbringing. In so doing they took account of the practical consequences of the religious convictions of the Jehovah's Witnesses, including their rejection of holidays such as Christmas and Easter which are customarily celebrated by the majority of the Austrian population, their opposition to the administration of blood transfusions, and in general their position as a social minority living by its own distinctive rules. The District and Regional Courts took note of the applicant's statement to the effect that she was prepared to allow the children to celebrate holidays with their father, who had remained Roman Catholic, and to allow the administration of blood transfusions to the children if and when required by law; they also considered the psychological relationship existing between the children (who were very young at the time) and the applicant and her general suitability as a carer.

In assessing the interests of the children, the Supreme Court considered the possible effects on their social life of being associated with a particular religious minority and the hazards attaching to the applicant's total rejection of blood transfusions not only for herself but - in the absence of a court order - for her children as well; that is, possible negative effects of her membership of the religious community of Jehovah's Witnesses. It weighed them against the possibility that transferring the children to the care of their father might cause them psychological stress, which in its opinion had to be accepted in their own best interests.

33. This Court does not deny that, depending on the circumstances of the case, the factors relied on by the Austrian Supreme Court in support of its decision may in themselves be capable of tipping the scales in favour of one parent rather than the other. However, the Supreme Court also introduced a new element, namely the Federal Act on the Religious Education of Children (see paragraphs 15 and 23 above). This factor was clearly decisive for the Supreme Court.

The European Court therefore accepts that there has been a difference in treatment and that that difference was on the ground of religion; this conclusion is supported by the tone and phrasing of the Supreme Court's considerations regarding the practical consequences of the applicant's religion.

Such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst other authorities, the Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 12, para. 31).

34. The aim pursued by the judgment of the Supreme Court was a legitimate one, namely the protection of the health and rights of the children; it must now be examined whether the second requirement was also satisfied.

35. In the present context, reference may be made to Article 5 of Protocol No. 7 (P7-5), which entered into force for **Austria** on 1 November 1988; although it was not prayed in aid in the present proceedings, it provides for the fundamental equality of spouses inter alia as regards parental rights and makes it clear that in cases of this nature the interests of the children are paramount.

36. In so far as the Austrian Supreme Court did not rely solely on the Federal Act on the Religious Education of Children, it weighed the facts differently from the courts below, whose reasoning was moreover supported by psychological expert opinion. Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.

The Court therefore cannot find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14 (art. 14+8).

**CASE OF D.H. AND OTHERS v. THE CZECH REPUBLIC**
*(Application no. 57325/00)*
JUDGMENT STRASBOURG 13 November 2007

******** ***Please, see attached as a separate document*** **********

## Article 1, Protocol 1

**CASE OF PRODAN v. MOLDOVA** *(Application no. 49806/99)*
JUDGMENT *2004*

. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1924 and lives in Chişinău.

11. In June 1946 the Soviet authorities nationalised the applicant's parents' house. In 1949 her parents were deported to Siberia.

12. On 8 December 1992 the Moldovan Parliament enacted Law No. 1225-XII "on the rehabilitation of the victims of the political repression committed by the totalitarian communist occupying regime". The Law enabled the victims of the Soviet repression to claim their confiscated or nationalised property.

13. In 1997 the applicant lodged an action with the Centru District Court (Judecătoria Sectorului Centru) by which she sought the restitution of her parents' house. At the material time the disputed house consisted of six apartments: nos. 3, 6, 7, 8, 12 and 13. Since apartments nos. 3, 6, 7, 8 and 13 had been purchased by their former tenants, the applicant sought to declare null and void the contracts by which they had been purchased from the State. She also sought the eviction of all the occupants of the house.

14. On 14 March 1997 the Centru District Court found in favour of the applicant and ordered the restitution of the house. It declared null and void the contracts by which apartments nos. 3, 6, 7, 8 and 13 had been sold to their tenants. The court further ordered the Municipal Council to evict all the occupants, including those of apartment no. 12, and indicated that the Municipal Council was to provide all the tenants with alternative accommodation.

15. The Municipal Council and the occupants lodged an appeal with the Chişinău Regional Court (Tribunalul Municipiului Chişinău) against the judgment of the Centru District Court. On 17 October 1997 the Chişinău Regional Court allowed the appeal and quashed the judgment of the Centru District Court.

16. The applicant lodged an appeal in cassation against the judgment of the Chişinău Regional Court. On 31 March 1998 the Court of Appeal (Curtea de Apel) rejected the appeal in cassation and upheld the judgment of the Chişinău Regional Court.

17. Following a request by the applicant, the Procurator General's Office applied for annulment of the judgments of the Chişinău Regional Court and the Court of Appeal with the Supreme Court of Justice (Curtea Supremă de Justiţie).

18. On 19 August 1998 the Supreme Court of Justice quashed the judgments of the Chişinău Regional Court and of the Court of Appeal, and upheld the judgment of the Centru District Court of 14 March 1997 on the ground that both the Chişinău Regional Court and the Court of Appeal had failed to observe the provisions of Law no. 1225-XII of 8 December 1992 (see paragraph 30 below).

19. On an unspecified date in 1998, after having obtained the enforcement warrant, the applicant asked the Municipal Council to execute the judgment of 14 March 1997. In a letter of 14 January 1999, the Municipal Council informed the applicant that due to a lack of funds for the construction of apartments for the evicted tenants, it could not execute the judgment.

20. In 1999 the applicant lodged a request with the Chişinău Land Register (Organul Cadastral Teritorial Chişinău) to issue her a certificate of ownership for the disputed house. In a letter of 15 September 1999, the Land Register informed the applicant that it would issue the ownership title only on the basis of an "act of delivery and receipt of the house" (act de predare-primire) issued by the Municipal Council.

21. In October 1999 the applicant lodged an action with the Centru District Court against the Municipal Council seeking damages for the delay in enforcing the judgment of 14 March 1997. On 17 November 1999 the Centru District Court rejected the action as unfounded. The applicant did not lodge an appeal against that judgment and it became final.

22. In 2000 the applicant lodged an action with the Centru District Court seeking a partial change in the manner in which the enforcement of the judgment of 14 March 1997 was to be carried out. In particular, she claimed money from the Municipal Council in lieu of restitution of apartments nos. 3, 6, 7, 12 and 13. On 7 February 2000 the Centru District Court ordered that a valuation of the apartments be carried out by the experts of the Chişinău Land Register. Following a request from the applicant, on 24 February 2000 the Centru District Court ordered that the valuation be carried out by independent real estate experts.

23. On 3 October 2000 the Centru District Court decided partially to change the manner of enforcement of the judgment of 14 March 1997 and ordered the Municipal Council to pay the applicant 488,274 Moldovan Lei (MDL), the market value of apartments nos. 3, 6, 7, 12 and 13.

24. The Municipal Council lodged an appeal with the Chişinău Regional Court against the above judgment. On 10 January 2001 the Chişinău Regional Court rejected the appeal and upheld the judgment of the Centru District Court of 3 October 2000.

25. In 2001 the applicant asked the Housing Division of the Municipal Council to execute the judgment of 14 March 1997 in so far as it concerned the eviction of the occupants of apartment no. 8. In a letter of 26 March 2001, the Municipal Council informed the applicant that due to a lack of funds for the construction of apartment buildings and available alternative accommodation for the evicted tenants, it could not enforce the judgment of 14 March 1997.

26. On 10 April 2001 the Centru District Court dismissed the Municipal Council's request seeking to stay the enforcement of the judgment of the District Court of 3 October 2000. On 19 June 2001 the Chişinău Regional Court, in its final judgment, rejected the Deputy Mayor's appeal against the above judgment.

27. Following a request by the Municipal Council, the Procurator General's Office applied to the Supreme Court of Justice for annulment of the judgments of the Centru District Court of 3 October 2000 and the Chişinău Regional Court of 10 January 2001.

28. On 12 September 2001 the Supreme Court of Justice dismissed the Procurator General's request for annulment.

29. On an unspecified date the applicant lodged a fresh request with the Municipal Council for the enforcement of the judgments of 14 March 1997 and 3 October 2000. In a letter of 23 October 2001, the Municipal Council informed the applicant that due to a lack of funds and alternative accommodation for the occupants of apartment no. 8, it could not enforce the judgment of 14 March 1997. As regards the enforcement of the judgment of 3 October 2000, the Municipal Council replied that the money would be paid after other court orders had been paid.

30. On 20 November 2002 the Municipal Council paid the applicant MDL 488,274 (the equivalent of EUR 29,238 at the time) in accordance with the judgment of 3 October 2000. The judgment of 14 March 1997 in respect of the eviction of the tenants from apartment no. 8 remained un-enforced.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

57. The applicant further complains that because of the non-enforcement of the judgments in her favour she was unable to enjoy her possessions, and thus her right to protection of property under Article 1 of Protocol No. 1 to the Convention was violated.

59. The Court reiterates that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention if it is sufficiently established to be enforceable (see the Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, Series A no. 301-B, § 59).

60. The Centru District Court's judgments of 14 March 1997 and 3 October 2000 became final and enforceable on 19 August 1998 and on 10 January 2001 respectively. But the applicant could not obtain the execution of these judgments as soon as they became enforceable. It follows that the impossibility for the applicant to obtain the execution of the judgment of 14 March 1997 until 10 January 2001 in respect of apartments nos. 3, 6, 7, 12 and 13, and until the present date in respect of apartment no. 8, constituted an interference with her right to peaceful enjoyment of her possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention. The impossibility for the applicant to obtain the execution of the judgment of 3 October 2000 in respect of the award of the market value of apartments nos. 3, 6, 7, 12 and 13 at least until 20 November 2002, must also be regarded as an interference with her right to peaceful enjoyment of her possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention.

61. By failing to comply with the judgments of the Centru District Court the national authorities prevented the applicant from receiving the money she could reasonably have expected to receive and from having the occupants evicted. The Government have not advanced any justification for this interference and the Court considers that lack of funds and of available alternative accommodation cannot justify such an omission (see, mutatis mutandis, Ambruosi v. Italy, no. 31227/96, §§ 28-34, 19 October 2000).

62. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

3. The applicant alleged, in particular, that the closure of its duty free shop and bar constituted a breach of its rights under Article 1 of Protocol No. 1 to the Convention.

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, Bimer S.A., is a company incorporated in the Republic of Moldova. From the moment of incorporation its shares were owned by Moldovan, American and Bahamian investors, it therefore qualified as a company owned by foreign investors and thus benefited from special incentives and guarantees under the Law on Foreign Investments (see paragraph 24 below).

1. Background to the case

8. On 10 June 1994 Presidential Decree No. 195 ("the Decree") was promulgated. It made possible the creation and operation of duty free shops at land, water and air-border crossings. According to the Decree, the duty free shops were entitled to sell imported goods without having to pay customs tax (see paragraph 23 below).

9. On 12 June 1997 the applicant company signed a contract with the Leuşeni Customs Office, at the border between Moldova and Romania, providing for the opening of duty free shops on the territory of the customs zone. The contract did not contain any provisions as to its duration. It was approved by the Head of the Customs Department of the Government and by the Minister of National Security.

10. On 3 July 1998 and on 2 December 1998 the company obtained two licences to operate a duty free shop and a duty free bar, within the shop, at the Leuşeni Customs Office. The licences were issued in accordance with the Decree and they did not contain any provisions as to their duration. Subsequently, the applicant company bought the necessary equipment, built the premises of the shop and bar and started operating them.

2. The change of legislation

11. On 24 April 2002 the Moldovan Parliament made an amendment to the Customs Code by which duty free sales outlets were thenceforward restricted to international airports and on board aircraft flying international routes (see paragraph 25 below).

12. On 18 May 2002 the Customs Department ordered the closure of all duty free outlets which were not located in international airports or on board aircraft flying international routes ("the order").

23. Presidential Decree No. 195 of 10 June 1994, in so far as relevant, reads:Section 3. Imported goods which are to be sold at "duty free" shops... shall be exempted from customs tax;

24. The Law on Foreign Investments of 1 April 1992, in so far as relevant, reads:

Section 39. Guarantees concerning nationalisation or expropriation of foreign capital investments

1. Foreign investments in the Republic of Moldova are granted complete security and protection.

2. Foreign investments cannot be expropriated, nationalised or subjected to any other similar measures in any way other than according to the law, on the basis of a law serving the

5. The affected investor is entitled to request verification of the legality of the expropriation, nationalisation or other similar measure and of the amount of the compensation in the manner provided for by law."

Section 40. Guarantees concerning forcible suspension and cessation of activity

1. The activity of an enterprise with foreign investors can be forcibly suspended only in accordance with a decision of the Government of the Republic of Moldova or a competent court, when the enterprise has seriously violated the terms of the legislation of the Republic of Moldova or the provisions of its articles of incorporation...

"Section 43. Guarantees concerning changes of legislation

1. In the event of the adoption of new legislative acts changing the conditions of activity of an enterprise with foreign capital created before the adoption of such acts, that enterprise shall have the right to have applied to it the legislation of the Republic of Moldova operating on the day of its creation for a period of ten years calculated from the day of the entry into force of

Foreign investors and enterprises with foreign investors which enjoyed customs, tax and other incentives in accordance with the former legislation of the Republic of Moldova shall enjoy those incentives after the new legislation comes into effect...."

25. The Customs Code of the Republic of Moldova as amended on 24 April 2002 reads:.

Section 56. A duty free outlet may be closed down if the licence expires or if it is annulled or withdrawn in accordance with the law."

B. The Court's assessment

49. It is undisputed between the parties that the applicant company's licence to operate the duty free shop and bar constituted a possession for the purposes of Article 1 of Protocol No. 1 to the Convention. The Court recalls that, according to its case-law, the termination of a valid licence to run a business amounts to an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of the Protocol (Tre Traktörer Aktiebolag v. Sweden judgment of 7 July 1989, Series A no. 159, § 55 and Rosenzweig and Bonded Warehouses Ltd. v. Poland, no. 51728/99,§ 48, 28 July 2005).

51. Insofar as the judgment of the Supreme Court is to be interpreted as meaning that, because of its limited impact, the Order did not interfere with the possessions of the applicant company for the purposes of Article 1 of Protocol No. 1, the Court is unable to accept this view. While it is true that the Order did not prevent the applicant company from carrying on

other activities authorised under its articles of association, as for instance the conducting of an ordinary retail business, and while the company could in principle have applied for a new licence to open a duty-free shop at an airport location, it is beyond dispute that the Order had the immediate and intended effect of preventing the applicant from continuing to operate its duty-free business at the Leuşeni Customs Office and of terminating the applicant's existing licence to carry on business at that location. In these circumstances, the Court finds that there was a clear interference with the applicant's right to the peaceful enjoyment of its possessions for the purposes of Article 1 of Protocol No. 1. Consistently with the Court's case-law referred to in paragraph 49 above, such interference constitutes a measure of control of use of property which falls to be examined under the second paragraph of that Article.

52. For a measure constituting control of use to be justified, it must be lawful (see, Katsaros v. Greece, no. 51473/99, § 43, 6 June 2002) and "for the general interest" or for the "securing of the payment of taxes or other contributions or penalties". The measure must also be proportionate to the aim pursued; however, it is only necessary to examine the proportionality of an interference that is lawful (see Katsaros, cited above, § 43).

54. The Government argued that the duty-free regime enjoyed by the applicant company under the terms of its licences did not constitute "customs, tax or other incentives" within the meaning of section 43 of the Law on Foreign Investments, such "incentives" referring only to those stipulated in section 35 and 36 of that Law. As noted above (paragraph 38), the Government submitted a letter from the Customs Department supporting this interpretation of the section. It was further contended by the Government that the Law on Foreign Investments and the Customs Code were organic laws and that the Code, being the more recent in time, was applicable in the case.

57. The former judgment of the Court of Appeal, unlike the latter, never became final, since it was quashed on appeal by the Supreme Court. However, as noted above, the judgment was set aside on the ground that there had been no relevant interference with the applicant's activities or with its right to property in international law. The Supreme Court did not dispute the Court of Appeal's interpretation of section 43 of the Law or its view that the second paragraph of that section would govern in the case of any interference with the right of a company with foreign capital to carry on a duty-free business. The Court has found above that there was such interference in the present case.

58. The Court reiterates that it is in the first place for the domestic authorities, notably the courts, to interpret and apply domestic law (Jahn and Others v. Germany [GC] nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005- ). It finds no grounds in the present case to call into question the view of the Court of Appeal, expressed on two occasions, that section 43 was applicable to the case of the present applicant and that the Order which required the immediate closure of the applicant's duty-free business at the Leuşeni Customs Office was not lawful under domestic law.

59. Accordingly, the interference with the applicant's property in the present case was not lawful and was therefore incompatible with the applicant's right to the peaceful enjoyment of its possessions within the meaning of Article 1 of Protocol No. 1. This conclusion makes it unnecessary to examine whether the other requirements of the second paragraph of Article 1 have been complied with (see Iatridis v. Greece [GC], no. 31107/96, § 62, ECHR 1999-II).

60. There has therefore been a violation of Article 1 of Protocol No. 1.

**CASE OF TRE TRAKTÖRER AKTIEBOLAG v. SWEDEN** *(Application no. 10873/84)*
JUDGMENT 07 July 1989
AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant, Tre Traktörer Aktiebolag ("TTA"), is a Swedish limited company with its seat at Helsingborg, Malmöhus County. Its sole shareholder is Mrs Olga Flenman.

A. Background to the case

8. On 30 July 1980 TTA took over the management of the restaurant Le Cardinal in Helsingborg and obtained on the same day a licence to serve beer, wine and miscellaneous alcoholic beverages.

1. Investigation by the tax authorities

11. In 1981 the Tax Department of the County Administrative Board (Länsstyrelsen) of Malmöhus County had carried out an inspection on AB Citykällaren's activities between 1 July 1979 and 30 June 1980. During this period Mrs Flenman had at various times managed three different establishments, including the restaurant Le Cardinal. The inspection, on the basis of which an audit report was drawn up on 17 September 1981, had revealed various inaccuracies in the book-keeping; the most significant discrepancy, estimated at 93,000 Swedish crowns (SEK), concerned the sale of beers, wines and spirits in that restaurant between March and June 1980. The total turnover of the company during this period was 770,000 SEK.

12. As a result of the audit report the assessment of Mrs Flenman's personal taxable income for 1980 was increased by 100,000 SEK.

On 1 February 1988, however, the County Court (Länsrätten) reduced this amount to approximately one half and the local tax department in Helsingborg issued the corresponding reassessment notice (omräkningsbesked).

2. Criminal proceedings against Mrs Flenman

13. As a further result of the audit report, criminal proceedings were also instituted against Mrs Flenman under section 10 of the Act on Tax Offences (skattebrottslagen) for having, as a representative of AB Citykällaren, deliberately or through gross negligence disregarded her book-keeping obligations and thereby seriously hindered control by the fiscal authorities (försvårande av skattekontroll). In the course of the hearing and in the light of the evidence presented, the prosecution reduced the scope of the charges it had originally brought on 23 February 1983.

On 27 May 1983 the District Court (Tingsrätten) of Helsingborg acquitted her on the following grounds: it was not established either that the result of the calculations concerning alcohol and tobacco could be explained by book-keeping mistakes, or that the discrepancies regarding the period from 6 to 17 March 1980, which were due to the absence of a cash register, had been caused deliberately or through gross negligence; and the other alleged discrepancies could not be considered to be of such a nature and extent as seriously to hinder control, within the meaning of the said section 10.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

52. The applicant company further submitted that there had been in its case a violation of Article 1 of Protocol No. 1 (P1-1) ("the Protocol"), which provides:

A. Applicability of Article 1 of the Protocol (P1-1)

53. The Government argued that a licence to serve alcoholic beverages could not be considered to be a "possession" within the meaning of Article 1 of the Protocol (P1-1). This provision was therefore, in their opinion, not applicable to the case.

Like the Commission, however, the Court takes the view that the economic interests connected with the running of Le Cardinal were "possessions" for the purposes of Article 1 of the Protocol (P1-1). Indeed, the Court has already found that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company’s business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant (see paragraph 43 above).Such withdrawal thus constitutes, in the circumstances of the case, an interference with TTA’s right to the "peaceful enjoyment of [its] possessions".

B. The Article 1 (P1-1) rule applicable to the case

54. Article 1 (P1-1) in substance guarantees the right of property (see the Marckx judgment of 13 June 1979, Series A no. 31, pp. 27-28, para. 63). It comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property by

enforcing such laws as they deem necessary in the general interest (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 61). However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, inter alia, the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 46, para. 106).

55. Severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate Le Cardinal as a restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein, which it finally sold in June 1984 (see paragraph 23 above). There was accordingly no deprivation of property in terms of Article 1 of the Protocol (P1-1).

The Court finds, however, that the withdrawal of TTA's licence to serve alcoholic beverages in Le Cardinal constituted a measure of control of the use of property, which falls to be considered under the second paragraph of Article 1 of the Protocol (P1-1).

C. Compliance with the requirements of the second paragraph

1. Lawfulness and purpose of the interference

56. The applicant company did not contest the legitimacy of the aim of the 1977 Act, and agreed with the Government that it was to implement the long-standing Swedish policy of restricting the consumption and abuse of alcohol. However, it criticised the actual measures of implementation taken by the National Board of Health and Welfare and the County Administrative Board. It complained, first, that they were adopted on the basis of section 64(2), as amended with effect from 1 July 1982, and therefore represented a retroactive application of this section to facts which had taken place in 1980-1981; and secondly, that they did not pursue the aforesaid aim, but sought to obtain the payment of taxes, thus constituting an abuse of power (détournement de pouvoir).

57. By subjecting the sale of alcoholic beverages to a system of licences, the Swedish legislature took measures to implement the national policy in this field. This was in line with Swedish social policy generally and the Court does not doubt that the aim so pursued was the control of the use of property in accordance with the general interest.

58. As to the actual measure of withdrawal in question, the Court notes that the National Board of Health and Welfare relied in its decision of 13 July 1983 on section 64(2) of the 1977 Act taken together with sections 40 and 70.

The Court's power to review compliance with domestic law is limited. It is in the first place for the national authorities to interpret and apply that law (see the Chappell judgment of 30 March 1989, Series A no. 152-A, p. 23, para. 54), and nothing in the above-mentioned decision suggests that it was contrary to Swedish law.Neither is there anything in the facts to support the applicant company's contention that the revocation of its licence did not seek the same purpose as the 1977 Act. In the said decision, the National Board of Health and Welfare had referred to the "great social responsibility" involved in the selling of alcoholic beverages, and had concluded, taking into account the explanations given by TTA as to the thefts of such

beverages, that "those who have had a decisive influence on the business have failed to demonstrate sufficient competence regarding both book-keeping and internal control" (see paragraph 19 above).Thus, the withdrawal of TTA's licence was lawful and pursued the general interest.

2. Proportionality of the interference

59. As was pointed out in the James and Others judgment of 21 February 1986 (Series A no. 98, p. 30, para. 37), the second paragraph of Article 1 of the Protocol (P1-1) has to be construed in the light of the general principle set out in the first sentence of this Article (P1-1). This sentence has been interpreted by the Court as including the requirement that a measure of interference should strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, inter alia, the above-mentioned Sporrong and Lönnroth judgment, Series A no. 52, p. 26, para. 69). The search for this balance is reflected in the structure of Article 1 (P1-1) as a whole (ibid.) and hence also in the second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the above-mentioned James and Others judgment, p. 34, para. 50).

60. The Government submitted that for the purposes of applying Article 1 (P1-1) of the Protocol the competent authorities enjoy a wide margin of appreciation. That margin was particularly wide with regard to Parliament, whose assessment as to the need for legislation, its aims and its effects should be accepted by the Convention institutions unless it was manifestly unreasonable and imposed an "excessive burden" on the person concerned (see, inter alia, the above-mentioned James and Others judgment, Series A no. 98, pp. 32 and 34, paras. 46 and 50). However, the applicant company had not shown that the closing of Le Cardinal was a consequence of the withdrawal of the licence; thus no economic damage flowed therefrom.

61. In respect of this latter point, the Court refers to its statement in paragraph 53 above. It sees no reason to exclude that the restaurant Le Cardinal closed on 19 July 1983 as a result of the County Administrative Board's decision of 18 July to revoke, with immediate effect, the licence to serve alcoholic beverages. Furthermore, no stay of execution having been granted by the National Board of Health and Welfare (see paragraph 21 above), the financial repercussions of the revocation were serious. The Court thus agrees with the Commission that this was a severe measure in the circumstances.

It must be borne in mind that, after that date, the competent authorities took three positive decisions in respect of the applicant company: on 7 January 1983 the County Administrative Board decided in the same proceedings to issue only an admonition against TTA under section 64, having regard to the considerable time which had elapsed - almost three years - since the discrepancies in the book-keeping of AB Citykällaren had occurred and to the fact that in the meantime there had been no further deficiencies (see paragraph 16 above); on 14 January the same Board renewed the applicant company's licence for Le Cardinal, extending the serving hours until 2.00 a.m. (see paragraph 17 above); and on 27 May the District Court of Helsingborg acquitted Mrs Flenman of the offence of hindering control by the fiscal authorities (see paragraph 13 above).

On the other hand, the discrepancies in the book-keeping of AB Citykällaren concerning the sale of alcoholic beverages were very significant in relation to the total turnover of the company (see paragraph 11 above).

62. The "burden" placed on TTA as a result of the contested decisions, though heavy, must be weighed against the general interest of the community. In this context, the States enjoy a wide margin of appreciation.

Even though the County Administrative Board and the National Board of Health and Welfare could have taken less severe measures under section 64 of the 1977 Act (see paragraph 27 above), the Court, having regard to the legitimate aim of Swedish social policy concerning the consumption of alcohol, finds that the respondent State did not fail to strike a "fair balance" between the economic interests of the applicant company and the general interest of Swedish society.

3. Conclusion

63. The Court thus concludes that there has been no violation of Article 1 of the Protocol (P1-1).