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Cour Européenne des Droits de l'Homme

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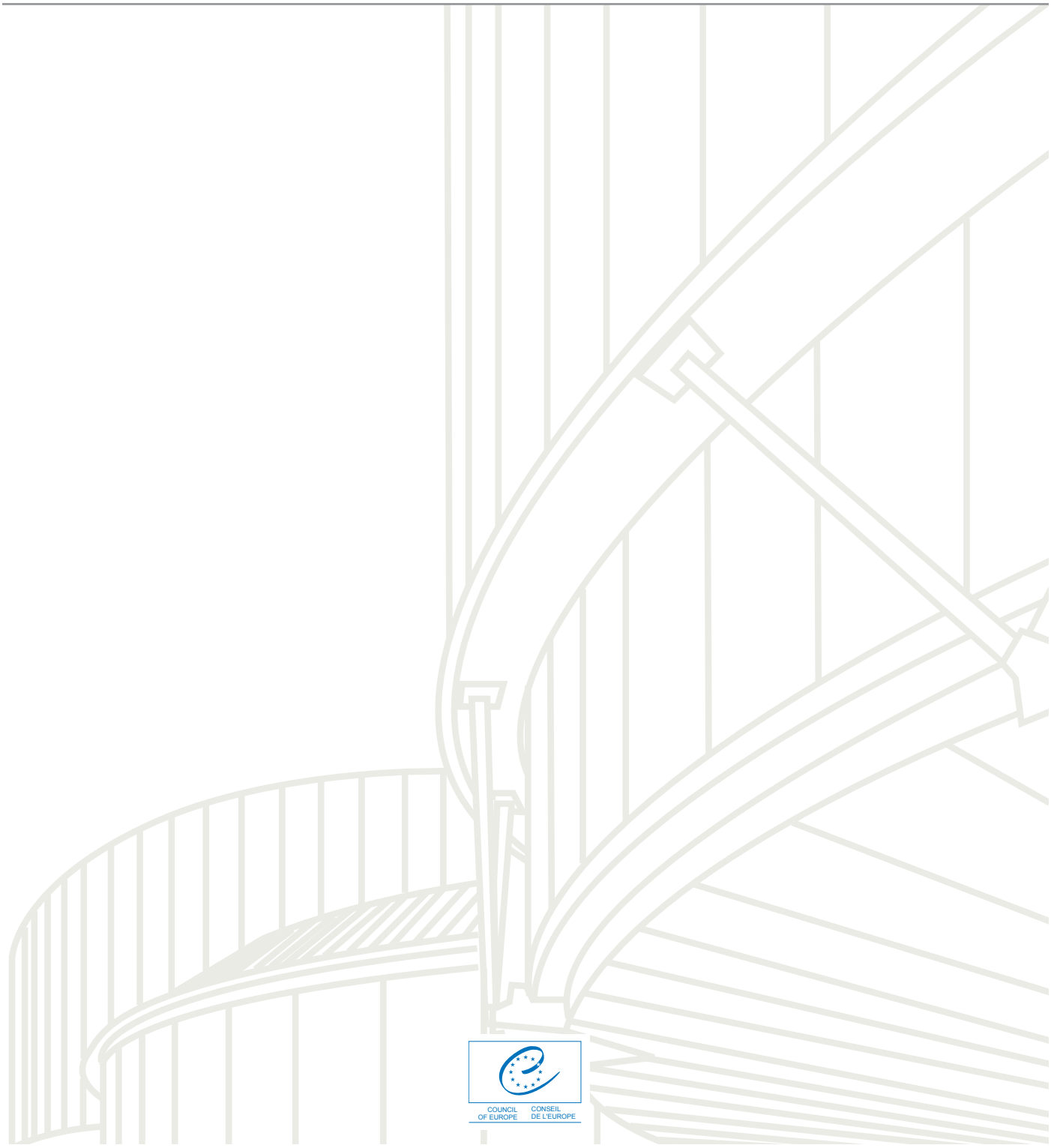

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ARTICLE 2

LIFE / VIE
Disappearance of applicants' relatives in Chechnya during military operations: *violations*.
Disparition de proches des requérants en Tchétchénie pendant des opérations militaires : *violations*.

BETAYEV/BETAÏEV and/et BETAYEVA/BATAÏEVA - Russia/Russie (N° 37315/03)
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SANGARIYEVA/SANGARIEVA and Others/et autres - Russia/Russie (N° 1839/04)
Judgments/Arrêts 29.5.2008 [Section I]

Facts: These four cases concern Russian military operations in Chechnya in late 2002 and the spring of 2003. The facts of each case are similar: close relatives of the applicants went missing after being abducted in night raids by armed men using military vehicles and wearing camouflage uniforms and balaclavas. Although criminal investigations were started they failed to identify the abductors or to lead to a prosecution. In the proceedings before the European Court, the Government declined (as in a number of previous cases) to produce certain documents from the criminal investigation files on the grounds that their disclosure would violate Article 161 of the Russian Code of Criminal Procedure since they contained information of a military nature or personal data on witnesses and other participants in the criminal proceedings.

Law: Article 2 – The Court noted that there was *prima facie* evidence, such as eye witness accounts and the fact that large groups of armed men in uniform had been able to move freely through military roadblocks during curfew hours, that the missing relatives had been apprehended by State servicemen. Although it did not in this instance examine the question of the Government's refusal to submit requested documents under Article 38 § 1 (a) of the Convention, it nevertheless drew inferences from that refusal and the absence of any other plausible explanation from the Government for the events in question. Observing that unacknowledged detention by unidentified servicemen in the context of the conflict in Chechnya could be regarded as life-threatening and the authorities' attitude towards the abduction had exacerbated the situation, it concluded that the applicants' relatives had to be presumed dead following their unacknowledged detention by Russian servicemen in circumstances in which there had been no justification for the use of lethal force.
Conclusion: violations (unanimously).

Other findings – The Court also found, in each of these cases, violations of the procedural limb of Article 2 and violations of Articles 3, 5 and 13. In *Betayev and Betayeva*, it also found a violation of Article 8 in respect of a search of the applicants' home without a warrant. The applicants were awarded sums in respect of non-pecuniary and, in the case of *Sangariyeva and Others*, pecuniary damage.

For further details on these cases, see Press Release nos. 391 (*Betayev and Betayeva*), 388 (*Gekhayeva*), 390 (*Ibragimov*) and 387 (*Sangariyeva*).

ARTICLE 3

TORTURE
Ill-treatment and unjustified use of truncheons against detainees and lack of effective investigation: *violation*.
Mauvais traitements et recours injustifié à des matraques à l'encontre de détenus, et absence d'enquête effective : *violation*.

DEDOVSKIY/DEDOVSKI and Others/et autres - Russia/Russie (N° 7178/03)
Judgment/Arrêt 15.5.2008 [Section I]

Facts: In 2001, while serving a prison sentence at a correctional colony, the seven applicants were ill-treated and beaten with truncheons by the *Varyag* squad, a special unit created to maintain order in detention facilities. The squad was allegedly called into the correctional colony to intimidate detainees who were being encouraged to engage in subversive activities by the leader of a criminal gang. The squad had instructions to maintain order by carrying out body searches of the detainees and of all quarters within the colony. The whole squad, except for its commander, wore balaclava helmets and camouflage uniforms with no indication of their rank and was armed with rubber truncheons. The criminal proceedings were discontinued in respect of most of the complaints of ill-treatment on the ground that the investigation had not obtained "objective information" to confirm the allegations. The charges brought against the commander and his subordinates for excess of power were also discontinued due to lack of evidence.

Law: Article 3 – (a) *Substantive aspect*: Having regard to the indiscriminate nature of the squad's operations, which targeted the entire colony rather than specific detainees, and the Government's acceptance of the applicants' factual submissions, the Court found it established to the requisite standard that the applicants had been subjected to the ill-treatment of which they had complained. The use of truncheons had no basis in law. The Penitentiary Institutions Act permitted rubber truncheons to be used in certain situations, for instance to prevent assaults, repress mass disorder; and apprehend prisoners who persistently disobeyed or resisted officers. Nevertheless, there was no evidence that the applicants had attacked officers or fellow detainees. The beatings had been individual rather than collective in nature. Even though some applicants had allegedly disobeyed or resisted the officers' orders, no attempt had been made to arrest them. Even though the officers may have needed to resort to physical force in certain cases, their actions had been grossly disproportionate to the applicants' alleged transgressions and were manifestly inconsistent with the goals they sought to achieve. It was obvious that hitting a detainee with a truncheon was not conducive to the desired result of facilitating the search. In such a situation, a truncheon blow was merely a form of reprisal or corporal punishment. Such a disproportionate response was all the more striking in case of the applicants who had simply refused to state their name or change clothes. The squad had therefore resorted to deliberate and gratuitous violence in order to arouse feelings of fear and humiliation which would break the applicants' physical or moral resistance, and to debase the applicants and drive them into submission. The truncheon blows must have caused intense mental and physical suffering amounting to torture.
Conclusion: violation (unanimously).

(b) *Procedural aspect*: Criminal proceedings had not been brought until one-and-a-half months after the event. However, no evidence had been produced to show that the applicants had been medically examined following the incident, as the records submitted referred only to subsequent examinations. Indeed, the lack of any "objective" evidence, such as medical records, had been given as a reason for discontinuing the proceedings in respect of most of the complaints. The reports on the use of truncheons had not specified which officers had used them. By allowing the squad to cover their faces and not to wear any distinctive signs on their uniforms, the authorities had knowingly made it impossible for them to be identified by their victims. That ground had even been given as the main reason for discontinuing the criminal proceedings. Similarly, the courts had hindered any meaningful attempt to bring those responsible to

account. Further, while the district court had acquitted the commander because he had exercised appropriate control over the lawfulness of the actions of his subordinates, the regional court had exonerated him on the ground that he was not able, or obliged, to control his officers in his absence. The Court accordingly noted the glaring contradictions between the findings of the domestic courts. Moreover, the applicants' right to participate effectively in the investigation had not been secured. The investigator had not heard evidence from the applicants or other victims in person and had not even considered mentioning their version of events in his decisions. There was no evidence that copies of the prosecutor's decisions had been duly served on the applicants. The investigation carried out into the applicants' allegations of ill-treatment had therefore not been thorough, adequate or efficient.
Conclusion: violation (unanimously).

Article 13 – While Russian civil courts in theory had the capacity to make an independent assessment of a case, in practice the weight attached to a preceding criminal inquiry was so important that even the most convincing evidence to the contrary would have been discarded and such a remedy would have been only theoretical and illusory. The criminal proceedings had been discontinued and, consequently, any other remedy, including a claim for damages, had limited chances of success. The applicants therefore had not had an effective remedy under domestic law to claim compensation for the ill-treatment they had suffered.
Conclusion: violation (unanimously).

Article 38 § 1 (a): Despite repeated requests, the Government had refused to submit a copy of a report by the head of department for supervision of compliance with laws in penitentiary institutions. The evidence contained in that report had been crucial to the establishment of the facts in the case. The reasons given by the Government for their refusal had been inadequate. Accordingly, the Government had failed to meet their obligations under Article 38 § 1 (a).
Conclusion: failure to comply (unanimously).

Article 41 – The Court awarded each applicant EUR 10,000 in respect of non-pecuniary damage.

INHUMAN OR DEGRADING TREATMENT /
TRAITEMENT INHUMAIN OU DÉGRADANT
Failure to secure the well-being of prisoners subjected to ethnically-motivated violence: *violation*.
Manquement à l'obligation d'assurer le bien-être des détenus victimes d'actes de violence inter-ethniques : *violation*.

RODIĆ and Others/et autres - Bosnia and Herzegovina/Bosnie-Herzégovine (N° 22893/05)
Judgment/Arrêt 27.5.2008 [Section IV]

Facts: The applicants, citizens of Bosnia and Herzegovina, were all convicted of war crimes against Bosniac civilians during the 1992-95 war in Bosnia and Herzegovina. Between August 2004 and May 2005 the applicants were each sent to Zenica Prison, the only maximum-security prison in that part of the country, where the prison population was approximately 90% Bosniac.
In May 2005 offensive graffiti referring to two of the applicants was discovered in the prison canteen. Those responsible were never identified. In early June 2005, following the screening of a video which showed a 1995 killing of Bosniacs from Srebrenica, a prisoner lured the second applicant into his cell and punched him in the eye with a clenched fist. Three days later, that applicant was taken to hospital. According to an official report, the attack was ethnically motivated, the attacker had a piece of glass in his hand and the consequences could have been more serious had it not been for the intervention of another prisoner. At the same time, another prisoner attacked the fourth applicant in the prison canteen. The prison guards intervened after he had received several blows to the head. He was taken to hospital.
On 8 June 2005 the applicants declared a hunger strike to attract public attention to their situation and were immediately placed in separate accommodation in the prison hospital unit. The same day the prisoners responsible for the attacks were sentenced to 20 days' solitary confinement and an investigation was opened by an *ad hoc* commission into the attacks. On 15 June 2005 the Ministry of Justice of Bosnia and Herzegovina ordered the applicants' transfer to another prison for security reasons. Subsequently, the

ad hoc commission issued its final report criticising the prison authorities for failing to protect the applicants. In their defence, the authorities cited, *inter alia*, the lack of prison staff. On 1 July 2005 the applicants discontinued their hunger strike in response to a request from the European Court.
The applicants complained unsuccessfully to the Constitutional Court of Bosnia and Herzegovina about the failure to enforce the decision of 15 June 2005 ordering their transfer to another prison and about the conditions of their detention in Zenica Prison. They applicants were subsequently transferred to Mostar Prison.

Law: Article 3 (detention with other inmates in Zenica Prison) – The applicants alleged that they had been persecuted by fellow prisoners from the time of their arrival in Zenica Prison until they were provided with separate accommodation in the prison hospital unit. The Court did not find the Government's policy of integrating those convicted of war crimes into the mainstream prison system to be inherently inhuman or degrading. However, it did not rule out that the implementation of that policy might raise issues under Article 3.
It was common ground that the three main ethnic communities in Bosnia and Herzegovina (Bosniacs, Croats and Serbs) had been at war against each other from 1992 until 1995. Because of the atrocities committed during the war, inter-ethnic relations were still strained and occurrences of ethnically-motivated violence were still relatively frequent during the relevant period. Serious incidents of ethnically-motivated violence directed against prisoners of Serb and Croat origin in Zenica Prison had also been reported. Taking into consideration the number of Bosniacs in the prison and the nature of the applicants' offences (war crimes against Bosniacs), it was clear that their detention there entailed a serious risk to their physical well-being. Despite that, no specific security measures were introduced in Zenica Prison for several months. The applicants were placed in ordinary cell blocks, where they had to share a cell with up to 20 other prisoners and they were provided with separate accommodation in the prison hospital only after the attacks of June 2005, their declaration of a hunger strike and the consequent media attention. This had occurred almost ten months after the first of the applicants arrived at the prison. It was true that Zenica Prison was experiencing a serious shortage of staff during the period under examination. However, structural shortcomings did not alter the obligation of the State to adequately secure the well-being of prisoners. The Court concluded that the applicants' physical well-being was not adequately secured from the time of their arrival at Zenica Prison until they were provided with separate accommodation in the hospital – a period which lasted between one and ten months, depending on the applicant.
Conclusion: violation (unanimously).

Article 3 (conditions of detention in Zenica Prison hospital) – The applicants were allocated more than 4 square metres of personal space (the minimum requirement for a single inmate in multi-occupancy cells according to the standards set by the Council of Europe's Committee for the Prevention of Torture or Degrading or Inhuman Treatment or Punishment). While their rooms were equipped with neither a toilet nor running water, the Government claimed, and the applicants did not disagree, that they had unlimited access to the communal sanitation facilities, including at night. The applicants had not complained about the adequacy of their access to natural light, ventilation, heating and artificial lighting. Having been under special protection, the applicants could not benefit from the entire range of available work, educational and recreational activities. It had to be noted, however, that they were able to watch television and obtain reading materials without restrictions. Finally, in the Court's opinion, they spent adequate time outside the hospital unit every day. There was no other indication that the facilities in issue were such as to render their use inhuman or degrading.
Conclusion: no violation (unanimously).

The Court also found a violation of Article 13 read in conjunction with Article 3 of the Convention for lack of an effective remedy in respect of the applicants' Article 3 complaint.

Article 41 – EUR 4,000 to the first and fourth applicants and EUR 2,000 to the second and third applicants in respect of non-pecuniary damage.

TRAITEMENT INHUMAIN OU DÉGRADANT /
INHUMAN OR DEGRADING TREATMENT
PEINE INHUMAINE OU DÉGRADANTE / INHUMAN OR DEGRADING PUNISHMENT
Infliction d'une peine d'emprisonnement à perpétuité en Italie : *irrecevable*.
Imposition of a life sentence in Italy: *inadmissible*.

GARAGIN - Italie/Italy (N° 33290/07)
Décision/Decision 29.4.2008 [Section II]

Le requérant a été condamné, en 1995 et 1997, par deux juridictions italiennes distinctes, à vingt-huit et à trente ans d'emprisonnement. En 1999, le parquet de Bologne, faisant application de l'article 78 § 1 du code pénal de 1930, a indiqué que la peine totale que le requérant devait purger était de trente ans d'emprisonnement, ce qui a été confirmé par le parquet de Rome en 2004. Selon ces indications, le requérant aurait dû être libéré le 19 mars 2021, ou bien à une date antérieure s'il bénéficiait d'une remise partielle de peine. Cependant, par une ordonnance de 2006, la cour d'assises d'appel de Rome, soulignant la jurisprudence applicable de la Cour de cassation, déclara que la peine que le requérant devait purger était celle de la réclusion criminelle à perpétuité, en application de l'article 73 § 2 dudit code. Le requérant se pourvut en cassation, sans succès.

Irrecevable sous l'angle de l'article 3 – Dans le système juridique italien une personne condamnée à perpétuité peut bénéficier d'un traitement carcéral moins contraignant et d'une libération anticipée. Se référant aux principes dégagés dans son arrêt *Kafkaris*, la Cour conclut qu'en Italie les peines perpétuelles sont *de jure* et *de facto* compressibles. On ne peut donc dire que le requérant n'a aucune perspective de libération ni que son maintien en détention, fût-ce pour une longue durée, est en soi constitutif d'un traitement inhumain ou dégradant. Le fait de lui imposer une peine de réclusion à perpétuité n'atteint pas le niveau de gravité nécessaire pour tomber dans le champ d'application de l'article 3 : *manifestement mal fondé*.
Il convient ensuite de savoir si le nouveau calcul de la peine du requérant, entraînant une privation de liberté plus longue que celle indiquée par le parquet, a violé les articles 5 et 7 de la Convention.

Irrecevable sous l'angle de l'article 5 – Faisant usage de leur droit incontesté d'interpréter le droit interne, et notamment les dispositions en matière d'addition de condamnations, les juridictions nationales ont estimé que l'article 73 § 2 du code pénal (aux termes duquel, en cas de plusieurs condamnations infligeant une peine non inférieure à vingt-quatre ans, on applique la réclusion à perpétuité) était *lex specialis* par rapport à l'article 78 § 1. La Cour constate que le processus amenant à la fixation de la peine totale que le requérant devait purger n'a pas été entaché d'arbitraire et n'a pas été autrement contraire aux prescriptions de l'article 5.
De plus, la Convention ne saurait faire obstacle à ce qu'une erreur de calcul dans la fixation de la peine à purger ou une interprétation erronée des règles en matière d'addition de condamnations soit corrigée par la suite : *manifestement mal fondé*.

Irrecevable sous l'angle de l'article 7 – Les peines prononcées contre le requérant étaient prévues par des dispositions du code pénal et le requérant n'allègue pas que ces dernières aient fait l'objet d'une application rétroactive. Par ailleurs, les juridictions nationales ont donné une interprétation non arbitraire des dispositions en matière d'addition des condamnations, qui étaient en vigueur à l'époque où les infractions reprochées à l'intéressé ont été commises. De plus, cette interprétation était confirmée par une jurisprudence de la Cour de cassation préexistante à l'affaire du requérant. Bref, on ne saurait conclure qu'une peine plus forte ait été imposée rétroactivement au requérant : *manifestement mal fondé*.

Voir également l'arrêt *Kafkaris c. Chypre* [GC], n° 21906/04, 12 février 2008, Note d'information n° 105.

EXPULSION
Proposed removal of HIV patient to her country of origin, where her access to appropriate medical treatment was uncertain: *removal would not constitute a violation*.
Menace d'expulsion d'une personne séropositive vers son pays d'origine, où il n'est pas sûr qu'elle puisse bénéficier du traitement médical approprié : *l'expulsion ne constituerait pas une violation*.

N. - United Kingdom/Royaume-Uni (N° 26565/05)
Judgment/Arrêt 27.5.2008 [GC]

Facts: The applicant, N., a Ugandan national, had entered the United Kingdom in 1998 under an assumed name and applied for asylum. In the ensuing months she was diagnosed as having two AIDS defining illnesses and a high level of immunosuppression. She was treated with antiretroviral drugs and her condition began to stabilise. In 2001 the Secretary of State refused her asylum claim on credibility grounds and also rejected a claim that her expulsion would constitute inhuman treatment under Article 3 of the Convention. Although the applicant successfully appealed to an adjudicator on the Article 3 point, that decision was overturned by the Immigration Appeal Tribunal, which found that medical treatment was available in Uganda even though it fell below the level of medical provision in the United Kingdom. The applicant's appeals to the Court of Appeal and the House of Lords were dismissed. At the date of the Grand Chamber's judgment, the applicant's condition was stable, she was fit to travel and was expected to remain fit as long as she continued to receive the basic treatment she needed. The evidence before the national courts indicated, however, that if she were to be deprived of the medication she had been receiving in the United Kingdom her condition would rapidly deteriorate and she would suffer ill-heath, discomfort, pain and death within a few years. According to information collated by the World Health Organisation, antiretroviral medication was available in Uganda, although, through a lack of resources, it was received by only half of those in need. The applicant claimed that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she came. It appeared that she had family members in Uganda, although she claimed that they would not be willing or able to care for her if she were seriously ill.

Law: The Court summarised the principles applicable to the expulsion of the seriously ill: Aliens subject to expulsion could not in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided there. The fact that the applicant's circumstances, including her or his life expectancy, would be significantly reduced if he or she were to be removed was not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State might raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling, as in *D. v. the United Kingdom* (*Reports of Judgments and Decisions* 1997-III – applicant critically ill and close to death, with no guarantees of any nursing or medical care in his country of origin or family there willing or able to provide even a basic level of food, shelter or social support). Article 3 did not place an obligation on Contracting States to alleviate disparities between the levels of treatment available in different countries through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. Finally, these principles had to apply to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering, pain and reduced life expectancy and require specialised medical treatment which might not be so readily available in the applicant's country of origin or which might be available only at substantial cost.
In the applicant's case, her claim was based solely on her serious medical condition and the lack of sufficient treatment available in her home country. The fact that the United Kingdom had provided her with medical and social assistance at public expense while her asylum application and claims under the Convention were being determined did not in itself entail a duty on its part to continue to provide for her. Although her quality of life and life expectancy would be affected if she were returned to Uganda, she was not critically ill. The rapidity of the deterioration she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, involved a certain degree of speculation, particularly in view of the constantly evolving situation as regards the

treatment of HIV and AIDS worldwide. Her case did not, therefore, disclose "very exceptional circumstances".
Conclusion: no violation (fourteen votes to three).

EXPULSION
Risk of ill-treatment in case of expulsion to Algeria of a terrorist suspect: *admissible*.
Risque de mauvais traitements en cas d'expulsion vers l'Algérie d'une personne soupçonnée de terrorisme : *recevable*.

RAMZY - Netherlands/Pays-Bas (N° 25424/05)
Decision/Décision 27.5.2008 [Section III]

The applicant is an Algerian national known to the Netherlands authorities under the name of "Mohammed Ramzy" as well as several aliases. Since 1998 he has been residing illegally in the Netherlands after two successive asylum requests were rejected. In 2002 the applicant and eleven others were arrested on suspicion of membership of an active Islamic extremist support network in the Netherlands. These suspicions were based on intelligence reports by the Netherlands national security agency. The network was believed to have links with the Algerian Groupe Salafiste pour la Prédication et le Combat (GSPC) and al-Qaeda and to be involved in the recruitment and preparation of young men in the Netherlands for Islamic extremist terrorist acts abroad (in Kashmir, Afghanistan and Iraq). In 2003, in the criminal proceedings known as "the Rotterdam jihad trial", the applicant was acquitted as the trial court concluded that the intelligence reports could not be used in evidence, given the absence of an effective opportunity for the defence to verify their content and completeness. Consequently, the applicant was released from pre-trial detention. Immediately after his release, he filed a third asylum request, claiming that he would be exposed in Algeria to a risk of ill-treatment for his suspected involvement with Islamic extremist terrorism, as the jihad trial had been given wide coverage in the international media. His request was rejected, as the alleged risk was deemed too general and unsubstantiated. In the meantime, in 2004 the Minister for Immigration and Integration issued an exclusion order against the applicant for posing a threat to national security. He unsuccessfully challenged both decisions before the courts. On 15 July 2005, at the applicant's request, the European Court decided to indicate to the respondent Government under Rule 39 of the Rules of Court that the applicant should not be removed to Algeria until further notice. Subsequently, he was released from detention. His request for access to the material on which the intelligence report was based, was rejected, as he had failed to submit a valid identity document. The judicial proceedings on this issue are still pending. In 2005 the Algerian authorities advised in reply to a request from their Dutch counterparts that the applicant was known in Algeria under another name, and issued a laissez-passer in that name. To date, it has not been used by the Netherlands authorities. In 2006 the Netherlands national security agency stated in a new report that the applicant had stayed in Algeria after July 2004. The applicant contested that statement. Referring to various reports on Algeria, he complains that, if he is expelled there, he will be exposed to a real risk of treatment contrary to Article 3 of the Convention. He further complains under Article 13 in conjunction with Article 3 that, as he has not been granted access to the material on which the national security agency relied in their reports, he has been denied the right to effective adversarial proceedings and therefore does not have an effective remedy. *Admissible*.

ARTICLE 5

Article 5 § 1

LAWFUL ARREST OR DETENTION / ARRESTATION OU DÉTENTION RÉGULIÈRES
Court orders detention to continue even though it finds the original detention order to be unlawful: *case referred to the Grand Chamber*.
Décisions d'un tribunal ordonnant le maintien en détention du requérant alors que la détention initiale avait été jugée illégale : *affaire renvoyée devant la Grande Chambre*.

MOOREN - Germany/Allemagne (N° 11364/03)
Judgment/Arrêt 13.12.2007 [Section V]

The case concerns the applicant's complaint about the unlawfulness of his pre-trial detention following his arrest on suspicion of tax evasion. The applicant argued that he had been deprived of his liberty contrary to Article 5 § 1 as the appellate court had ordered his detention to continue even though it considered the original detention order to be unlawful.
In its Chamber judgment of 13 December 2007, (see Press Release no. 917), the Court held by five votes to two that there had been no violation of Article 5 § 1 (right to liberty and security).
The Court held unanimously that there had been two violations of Article 5 § 4 on account of the lack of speedy review of the lawfulness of the applicant's detention and the refusal to grant access to the case files in those review proceedings.

The case was referred to the Grand Chamber at the applicant's request.

ARRESTATION OU DÉTENTION RÉGULIÈRES / LAWFUL ARREST OR DETENTION
Calcul de la peine totale à purger après condamnations à deux peines d'emprisonnement par deux juridictions distinctes : *irrecevable*.
Calculation of total period to be served after applicant received prison sentences from two different courts: *inadmissible*.

GARAGIN - Italie/Italy (N° 33290/07)
Décision/Decision 29.4.2008 [Section II]

(Voir l'article 3 ci-dessus / see Article 3 above).

Article 5 § 3

LENGTH OF PRE-TRIAL DETENTION / DURÉE DE LA DÉTENTION PROVISOIRE
Pre-trial detention of a minor for 48 days in an adult facility: *violation*.
Détention provisoire d'un mineur pendant 48 jours dans un centre pour adultes : *violation*.

NART - Turkey/Turquie (N° 20817/04)
Judgment/Arrêt 6.5.2008 [Section II]

Facts: The applicant, then aged seventeen, was arrested on suspicion of the armed robbery of a grocer's shop and held in an adult prison. His lawyer applied for his release on the grounds that, as a minor, he could be detained only as a measure of last resort and not in an adult facility. However, the application was refused by an assize court on account of the nature of the offence and the state of the evidence. The

applicant remained in custody for a total of 48 days before being released at the start of his trial. In his application to the Court, he complained of the length of his pre-trial detention.

Law: Various international texts indicated that the pre-trial detention of minors was to be used only as a measure of last resort and to be as short as possible. Likewise, minors were to be kept apart from adults. The applicant had been held in pre-trial detention for 48 days. In finding that period to have been excessive, the Court noted that the authorities had failed to take his age into consideration, that he had been held in a prison with adults and that "the state of the evidence" could not by itself justify the length of his detention.
Conclusion: violation (five votes to two).

Article 41 – EUR 750 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 [civil]

APPLICABILITY / APPLICABILITÉ
FAIR HEARING / PROCÈS ÉQUITABLE
Disciplinary proceedings resulting in restriction on family visits to prison: *Article 6 applicable; violation (unfair proceedings)*.
Procédure disciplinaire ayant entraîné une restriction à l'égard des visites de la famille dans les prisons : *article 6 applicable; violation (procédure inéquitable)*.

GÜLMEZ - Turkey/Turquie (N° 16330/02)
Judgment/Arrêt 20.5.2008 [Section II]

Facts: In 2001 the applicant, a prisoner in Ankara Sincan F-type Prison, was found guilty on five different occasions of various disciplinary offences (including damaging prison property and chanting slogans). For each offence he was prohibited from receiving visits for a certain period amounting to almost a year in all. He appealed to the Ankara State Security Court against each of the sanctions, but to no avail.

Law: Article 6 – Since the disciplinary proceedings did not involve the determination of a criminal charge against the applicant, it was necessary to establish whether they concerned a genuine and serious "dispute" over civil rights or obligations recognised under domestic law. The restriction of the applicant's visiting rights clearly fell within the sphere of his personal rights and was therefore civil in nature. Moreover, since the domestic law provided judicial remedies against disciplinary sanctions imposed on prisoners, the applicant had the right to challenge those sanctions before the domestic courts. The above sufficed for the Court to conclude that Article 6 was applicable to the applicant's case. As to the merits, the Court drew particular attention to Article 59 (c) of the European Prison Rules, adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, according to which prisoners charged with disciplinary offences should be allowed to defend themselves in person or through legal assistance when the interests of justice so required. Pursuant to the domestic law at the material time, prisoners' appeals against disciplinary sanctions were examined on the basis of the case file, without holding a public hearing. The applicant's defence submissions were only taken into account before imposing various sanctions and he was not afforded the opportunity of defending himself through a lawyer before the domestic courts which decided his disciplinary appeals. In conclusion, the applicant could not effectively follow the proceedings against him.
Conclusion: violation (unanimously).

Article 8 – Save for the right to liberty, prisoners generally continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention, including the right to respect for family life. In the present case, the restrictions imposed on the applicant's visiting rights lasting almost one year were based

on applicable regulations, which as in force at the material time did not indicate in precise terms the punishable acts or related penalties, leaving the domestic authorities a wide degree of discretion in this respect. In these circumstances the Court concluded that the domestic regulations failed to meet the "quality of law" requirement.
Conclusion: violation (unanimously).

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

Article 46 – Domestic legislation concerning disciplinary offences committed in prison, as in force since January 2005, provided a sufficiently clear and detailed list of punishable acts and sanctions relating to them. However, the procedure to be followed in such proceedings remained unchanged and the charged prisoners were still not allowed to defend themselves in person or through legal assistance. Having regard to the systematic situation identified and with a view to ensuring the effective protection of the right to a fair hearing in accordance with Article 6 of the Convention, the Court considered it desirable for the respondent State to bring its legislation in line with the principles set out in Articles 57 § 2 (b) and 59 (c) of the European Prison Rules.

APPLICABILITY / APPLICABILITÉ
No right under domestic law to obtain a permit to provide betting and gaming services: *inadmissible*.
Absence en droit interne du droit d'obtenir une licence pour organiser des paris et des jeux de hasard : *irrecevable*.

LADBROKES WORLDWIDE BETTING - Sweden/Suède (N° 27968/05)
Decision/Décision 6.5.2008 [Section III]

The applicant, a UK based company, applied to the Government for a permit to provide betting and gaming services in Sweden under section 45 of the Lotteries Act. The Government rejected the application noting that betting and gaming in Sweden was essentially reserved for the State and that the profits arising from such activities should be for the benefit of the public or for public utility purposes. The applicant applied for judicial review of that decision to the Supreme Administrative Court and moved for withdrawal of certain judges from sitting in his case. The court rejected that motion and subsequently dismissed the applicant's appeal, upholding the Government's findings.
The applicant complained of the lack of independence and impartiality of the Supreme Administrative Court. However, it was first necessary to establish whether there existed a right that could arguably be said to be recognised by Swedish law. Under the Lotteries Act, betting and gaming services depended on granting a permit generally reserved for Swedish non-profit making associations fulfilling certain requirements. Moreover, section 45 of that Act conferred on the Government the power to grant a permit to arrange lotteries whenever they considered it appropriate, without specifying how and when that power should be used. Given such unfettered discretion on the part of the public authority, the applicant could not claim to have an actual right that could be said to have been recognised under domestic law: *incompatible* ratione materiae.

Article 6 § 2

PRÉSOMPTION D'INNOCENCE / PRESUMPTION OF INNOCENCE
Existence en droit interne de recours spécifiques de nature à remédier à la violation de présomption d'innocence : *irrecevable (non-épuisement des voies de recours internes)*.
Specific remedies available in domestic law for violations of the presumption of innocence: *inadmissible (non-exhaustion of domestic remedies)*.

MARCHIANI - France (N° 30392/03)
Décision/Decision 27.5.2008 [Section V]

Le requérant fait actuellement l'objet de plusieurs procédures pénales, instruites par un même juge d'instruction, dans lesquelles de nombreux actes de procédure furent diligentés notamment pour abus de biens sociaux. Les autorités françaises transmirent au Parlement européen un rapport du procureur général près la cour d'appel relatif à une demande de levée de l'immunité parlementaire du requérant. Celui-ci précisait qu'une mesure de détention provisoire du requérant était seule susceptible de faire cesser le trouble causé à l'ordre public, de maintenir l'intéressé à la disposition des autorités judiciaires, de l'empêcher d'entrer en contact avec les différents témoins ou complices de ses agissements et de permettre aux enquêteurs de mener normalement leurs investigations. Un journal publia un article sur la demande de levée d'immunité parlementaire avec le contenu des deux précédentes requêtes, dans lesquelles le juge évoque la nécessité de placer l'élu en détention. La commission juridique et du marché intérieur du Parlement européen rejeta à l'unanimité la demande de levée de l'immunité parlementaire du requérant.
Le placement du requérant sous le régime de la détention provisoire fut ordonné mais ce dernier fut remis en liberté assortie d'un contrôle judiciaire.
Le juge d'instruction prescrivit l'interception et l'enregistrement des conversations téléphoniques de la ligne du domicile du requérant et du téléphone portable de son épouse. Les pièces d'exécution des deux commissions rogatoires furent versées au dossier. Le requérant déposa une requête en nullité d'actes de la procédure car les écoutes téléphoniques avaient été prescrites alors qu'il était encore membre du Parlement européen. Il sollicitait l'annulation des pièces contenant la retranscription des conversations téléphoniques dans la mesure où le président du Parlement européen n'avait pas été avisé de ces écoutes. Il ajouta que la cour ne pouvait écarter l'application du Code de procédure pénale aux députés européens sans avoir préalablement consulté à titre préjudiciel la Cour de justice des Communautés européennes ou le ministre des Affaires étrangères qui pourrait seul interpréter les traités lorsque leur interprétation soulève des questions d'ordre public international. La chambre de l'instruction de la cour d'appel prononça la nullité de certaines pièces de la procédure et ordonna l'annulation de certaines autres pièces. Entre-temps, le juge d'instruction versa aux dossiers des copies extraites de la retranscription des interceptions téléphoniques ordonnées durant le mandat. Le requérant déposa deux requêtes en nullité d'actes de la procédure. Il se pourvut en cassation ainsi que le Procureur Général près la cour d'appel. La Cour de cassation cassa et annula sans renvoi, en ses seules dispositions ayant prononcé la nullité des actes d'information, les arrêts de la chambre de l'instruction de la cour d'appel.
Le Parlement européen vota une décision dans laquelle il décida de défendre l'immunité et les privilèges du requérant, ancien député ; demanda que l'arrêt de la Cour de cassation soit annulé ou révoqué et, en tout état de cause, que cesse tout effet de fait ou de droit dudit arrêt ; chargea son Président de transmettre immédiatement la présente décision et le rapport de sa commission compétente à la Cour de cassation, au Gouvernement, à l'Assemblée Nationale et au Sénat de la République française. Le Parlement européen prit aussi une résolution sur une éventuelle infraction au Protocole sur les privilèges et immunités des Communautés européennes par un Etat membre dans laquelle il décide de demander à la Commission d'entamer la procédure contre la République française pour infraction au droit communautaire.
Le requérant fut renvoyé devant le tribunal de grande instance pour y répondre des faits qui lui étaient reprochés. Il demanda au tribunal de saisir la Cour de justice des Communautés européennes d'une question préjudicielle sur l'interprétation et l'application du Protocole sur les privilèges et immunités des Communautés européennes. Il indiquait avoir saisi la Cour européenne des droits de l'homme d'un grief tiré de l'article 8 de la Convention et expliquait que, au vu de l'opposition existant entre les arrêts de la Cour de cassation et les termes du Protocole comme ceux de la décision du Parlement européen, cette mesure s'imposait. Le tribunal rejeta les exceptions d'irrecevabilité. Il considéra que le renvoi préjudiciel n'était pas nécessaire dès lors que, conformément à l'arrêt prononcé par la chambre criminelle de la Cour de cassation – dont la décision s'impose quant à la réintégration au dossier d'information des actes argués de nullité – l'extension aux représentants du Parlement européen des dispositions du code de procédure pénale ne pouvait procéder de l'application du Protocole sur les privilèges et immunités. Le requérant fut reconnu coupable des faits reprochés.

Irrecevable sous l'angle de l'article 6 § 2 – Le rapport du procureur général transmis au président du Parlement européen se borne à relever les éléments du dossier de la procédure pouvant conduire à ordonner un placement en détention provisoire. Ainsi, les déclarations formulées par le procureur général

n'ont nullement porté atteinte à la présomption d'innocence du requérant. Par ailleurs, celui-ci se plaint de la publication dans un journal de certains passages du rapport susmentionné et de la complicité alléguée des autorités judiciaires internes dans cette publication. Or, la Cour ne peut être saisie qu'après l'épuisement des voies de recours internes. Dans la présente affaire, il existe en droit français des recours spécifiques dont le requérant pouvait faire usage en l'espèce et qui étaient de nature à remédier à la violation alléguée. Il lui appartenait d'engager les recours utiles, aucune obligation relative au déclenchement *ex officio* des procédures évoquées ne pesant sur l'Etat défendeur en la matière : *non-épuisement des voies de recours internes*.

Irrecevable sous l'angle de l'article 8 – Les interceptions des communications téléphoniques s'analysent en une ingérence dans le droit à la vie privée et à la correspondance. Ces dernières, ordonnées par un juge d'instruction sur le fondement d'articles du code de procédure pénale – eux-mêmes insérés par la loi sur le secret des correspondances émises par la voie des télécommunications – ont une base légale. En outre, la loi était accessible. Quant à sa prévisibilité, le requérant se plaint essentiellement de l'illégalité des mesures d'interception des communications téléphoniques en cause, au motif que les prescriptions du code de procédure pénale, relatives au traitement particulier réservé à un corps social déterminé, ont été jugées par la Cour de cassation inapplicables aux membres du Parlement européen dont il faisait partie. Or, les articles du code de procédure pénale posent des règles claires et détaillées et précisent avec suffisamment de clarté l'étendue et les modalités d'exercice du pouvoir d'appréciation des autorités dans le domaine considéré. D'autre part, s'agissant de l'applicabilité du code de procédure pénale aux membres du Parlement européen, il incombe au premier chef aux autorités nationales, et singulièrement aux cours et tribunaux, d'interpréter et d'appliquer le droit interne, même lorsque celui-ci renvoie au droit international ou à des accords internationaux. De même, les organes judiciaires de la Communauté sont mieux placés pour interpréter et appliquer le droit communautaire. Le rôle de la Cour se limite à vérifier la compatibilité avec la Convention des effets de telles décisions. Il ne lui appartient pas, en principe, d'exprimer une opinion contraire à celle de la Cour de cassation sur le champ d'application du code de procédure pénale et la nature des mesures qu'il prévoit, sauf en cas d'interprétation manifestement arbitraire, ce qui n'est pas le cas en l'espèce. En outre, le Protocole sur les privilèges et immunités des Communautés européennes, en l'absence de cadre juridique autonome et uniforme pour le régime d'immunité du Parlement européen, renvoie expressément aux droits nationaux pour ce qui est du contenu matériel de l'immunité du membre du Parlement lorsque ce dernier est poursuivi dans son propre pays. Cela étant, le régime juridique de l'immunité parlementaire en droit français, qui recouvre les notions d'irresponsabilité et d'inviolabilité, ne met aucun obstacle à l'engagement de poursuites pénales à l'encontre d'un député ou à ce que celui-ci fasse l'objet de mesures d'instruction ou d'investigation, sauf à l'occasion des opinions ou votes émis par lui dans l'exercice de ses fonctions. L'article du code de procédure pénale ne concerne que les députés et les sénateurs, c'est-à-dire les membres du Parlement national et, à défaut de texte ou de principe allant en sens contraire, il ne saurait s'appliquer ni même être transposé aux membres du Parlement européen. Les formalités prescrites par cette règle le sont à peine de nullité, alors que les nullités doivent de façon générale être entendues strictement, et aucune décision de droit communautaire ni aucun arrêt du juge communautaire n'interprète l'article en question dans le sens extensif suggéré par le requérant. En conséquence, sa non-application au requérant ne remet en cause ni le fondement juridique légal des interceptions des conversations téléphoniques qu'il a tenues, ni la qualité requise de la loi y relative. Les mesures litigieuses étaient donc prévues par la loi. Enfin, l'ingérence visait à permettre la manifestation de la vérité dans le cadre d'une procédure pénale et tendait à la défense de l'ordre. Le requérant a eu toute latitude pour faire valoir ses arguments devant les juridictions compétentes, dans la mesure où il a pu introduire une requête en nullité d'actes de la procédure, visant les écoutes diligentées, devant la chambre de l'instruction de la cour d'appel puis devant la Cour de cassation. Outre le fait que les écoutes litigieuses avaient été ordonnées par un magistrat et réalisées sous son contrôle, les dispositions de la loi régissant les écoutes téléphoniques répondent aux exigences de l'article 8 de la Convention. Le requérant n'a donc pas été privé de la protection effective de la loi nationale en la matière et il a disposé d'un contrôle efficace pour contester les écoutes téléphoniques dont il a fait l'objet. Ainsi, l'ingérence en cause n'était pas disproportionnée par rapport au but légitime poursuivi : *manifestement mal fondée*.

ARTICLE 7

Article 7 § 1

PEINE PLUS FORTE / HEAVIER PENALTY
Calcul final de la peine totale à purger après condamnations à deux peines d'emprisonnement résultant en une privation de liberté plus longue que celle d'abord indiquée par le parquet : *irrecevable*.
Final calculation of total period to be served after applicant received two prison sentences that led to a longer deprivation of liberty than that initially indicated by State Counsel's Office: *inadmissible*.

GARAGIN - Italie/Italy (N° 33290/07)
Décision/Decision 29.4.2008 [Section II]

(Voir l'article 3 ci-dessus / see Article 3 above).

ARTICLE 8

PRIVATE LIFE / VIE PRIVÉE
Restrictions on obtaining an abortion in Ireland: *communicated*.
Restrictions à l'avortement en Irlande : *communiquée*.

A., B. and/et C. - Ireland/Irlande (N° 25579/05)
[Section III]

Under Irish law as interpreted by the Supreme Court, an abortion is lawful only if there is a real and substantive risk to the life of the mother that can be averted only by a termination of pregnancy. Since the introduction of the Thirteenth and Fourteenth Amendments to the Constitution, it is now lawful for Irish residents to have an abortion abroad or to obtain or make available information relating to services available in another State.
All three applicants were resident in Ireland at the material time, had become pregnant unintentionally and had decided to have an abortion as they considered that their personal circumstances did not permit them to take their pregnancies to term. The first applicant was an unemployed single mother. Her four young children were in foster care and she feared that having another child would jeopardise her chances of regaining custody after sustained efforts on her part to overcome an alcohol-related problem. The second applicant had been advised that she had a substantial risk of an ectopic pregnancy and in any event did not wish to become a single parent. The third applicant, a cancer patient, was unable to find a doctor willing to advise whether her life would be at risk if she continued to term or how the foetus might have been affected by contraindicated medical tests she had undergone before discovering she was pregnant. As a result of the restrictions in Ireland all three applicants were forced to seek an abortion in a private clinic in England in what they described as an unnecessarily expensive, complicated and traumatic procedure. The first applicant was forced to borrow money from a money lender, while the third applicant, despite being in the early stages of pregnancy, had to wait for eight weeks for a surgical abortion as she could not find a clinic willing to provide a medical abortion (drug-induced miscarriage) to a non-resident because of the need for follow-up. All three applicants experienced complications on their return to Ireland, but were afraid to seek medical advice there because of the restrictions on abortion.
Communicated under Article 2 (third applicant) and Articles 3, 8, 13 and 14.

PRIVATE LIFE / VIE PRIVÉE
Gynaecological examination imposed on a detainee without her free and informed consent: *violation*.
Examen gynécologique imposée à une détenue en l'absence de consentement libre et éclairé : *violation*.

JUHNKE - Turkey/Turquie (N° 52515/99)
Judgment/Arrêt 13.5.2008 [Section IV]

Facts: In 1997 the applicant, a German national, was arrested by Turkish soldiers on suspicion of membership of an illegal armed organisation, the PKK (Workers' Party of Kurdistan) and handed over to local gendarmes. In 1998 she was convicted as charged and sentenced to imprisonment. In the meantime she lodged a petition with a public prosecutor's office, stating that she had been subjected to a gynaecological examination without her consent. She further claimed that she had been stripped naked and sexually harassed by several gendarmes present during the examination. The applicant had requested the prosecution of both the gendarmes and the doctor. In 2002 the criminal investigation against the gendarmes was suspended by the Supreme Administrative Court. In 2004 she was released and deported to Germany.

Law: The applicant had resisted the gynaecological examination until persuaded to agree to it. Given the vulnerability of a detainee at the hands of the authorities, she could not have been expected to have resisted the examination indefinitely. She had been detained *incommunicado* for at least nine days prior to the intervention. At the time of the examination, she had apparently been in a particularly vulnerable mental state. It was not suggested that there had been any medical reason for such an examination or that it had been carried out in response to a complaint of sexual assault lodged by her. It remained, moreover, unclear whether she had been adequately informed of the nature and the reasons for the measure. In the light of the doctor's statement, she might have been misled into believing that the examination had been compulsory. It could not be concluded with certainty that any consent given by the applicant had been free and informed. The imposition of a gynaecological examination on her, in such circumstances, had given rise to an interference with her right to respect for her private life, and in particular her right to physical integrity. Further, it had not been shown that that interference had been "in accordance with the law", as the Government had not presented any arguments to the effect that interference was based on and was in compliance with any statutory or other legal rule. The impugned examination had not been part of the standard medical examination applied to persons arrested or detained. Rather it appeared to have been a discretionary decision – not subject to any procedural requirements – taken by the authorities in order to safeguard the members of the security forces, who had arrested and detained the applicant, against a potential false accusation by the applicant of sexual assault. Even if this could, in principle, have constituted a legitimate aim, the examination had not been proportionate to such an aim. The applicant had not complained of having been sexually assaulted and no reason had been advanced suggesting that she would be likely to do so. Therefore, that aim was not such as to justify overriding the refusal of a detainee to undergo such an intrusive and serious interference with her physical integrity or seeking to persuade her to give up her express objection. The gynaecological examination which had been imposed on the applicant without her free and informed consent had not been shown to have been "in accordance with the law" or "necessary in a democratic society".
Conclusion: violation (five votes to two).

The Court found no violation of Article 3 and a violation of Article 6.

Article 41 – EUR 4,000 in respect of non-pecuniary damage.

See also *Y.F. v. Turkey*, no. 24209/94 in Information Note no. 55.

VIE PRIVÉE / PRIVATE LIFE
CORRESPONDANCE / CORRESPONDENCE
Traitement particulier réservé aux députés nationaux jugé par la Cour de cassation inapplicable à un membre du Parlement européen victime d'interceptions téléphoniques : *irrecevable*.
Ruling by Court of Cassation that a special procedure that had to be followed before the telephone calls of a member of the national parliament could be monitored did not apply to the monitoring of calls of members of the European Parliament: *inadmissible*.

MARCHIANI - France (N° 30392/03)
Décision/Decision 27.5.2008 [Section V]

(Voir l'article 6 § 2 ci-dessus / see Article 6 § 2 above).

CORRESPONDENCE / CORRESPONDANCE
Systematic monitoring of the entirety of a prisoner's correspondence: *violation*.
Surveillance systématique de la totalité de la correspondance d'un détenu : *violation*.

PETROV - Bulgaria/Bulgarie (N° 15197/02)
Judgment/Arrêt 22.5.2008 [Section V]

(See Article 14 below / voir l'article 14 ci-dessous).

FAMILY LIFE / VIE FAMILIALE
Restrictions on contact before trial between a remand prisoner and his wife on the ground that she might be called as a prosecution witness: *violation*.
Restrictions aux contacts avant son procès entre un homme en détention provisoire et sa femme au motif qu'elle pouvait être citée comme témoin à charge : *violation*.

FERLA - Poland/Pologne (N° 55470/00)
Judgment/Arrêt 20.5.2008 [Section IV]

Facts: The applicant was charged with the aggravated assault of a neighbour and detained pending trial. His wife said in statements to the police that she had not witnessed the incident and would not testify against her husband. During the eleven-month period leading up to the trial, she was allowed to visit him only once, her other requests being turned down on the grounds that she would be called as a witness for the prosecution. At the trial, he was convicted and sentenced to four years' imprisonment.

Law: The case turned on the issue of whether the measure was "necessary in a democratic society". Initially the measure could be considered to have been necessary and reasonable despite the harsh consequences it had had on the applicant's family life. However, the Court had to consider whether its continued application was compatible with Article 8. Although the applicant's wife had stressed that she had no information to offer and had subsequently refused to testify, she had been allowed to visit the applicant only once. The authorities had not considered any alternative means, such as supervision by a prison officer or other restrictions on its nature, frequency and duration, of ensuring that the applicant's contact with his wife would not lead to collusion or otherwise obstruct the process of taking evidence. Indeed, the authorities had not seen any obstacle to her visiting the applicant on the one occasion they had allowed her to do so. In the circumstances, and having regard to their duration and nature, the restrictions on the applicant's contact with his wife went beyond what was necessary in a democratic society "to prevent disorder and crime" and failed to maintain a fair balance between the means employed and the aim pursued.
Conclusion: violation (unanimously).

Article 41 – EUR 1,500 in respect of non-pecuniary damage.

FAMILY LIFE / VIE FAMILIALE
Disciplinary proceedings resulting in restriction on family visits for almost a year: *violation*.
Procédure disciplinaire ayant entraîné une restriction à l'égard des visites de la famille pendant près d'un an : *violation.*

GÜLMEZ - Turkey/Turquie (N° 16330/02)
Judgment/Arrêt 20.5.2008 [Section II]

(See Article 6 § 1 above / voir l'article 6 § 1 ci-dessus).

HOME / DOMICILE
Eviction of council-house tenant under summary procedure affording inadequate procedural safeguards: *violation*.
Expulsion du locataire d'un logement social dans le cadre d'une procédure sommaire n'offrant pas de garanties procédurales suffisantes : *violation*.

McCANN - United Kingdom/Royaume-Uni (N° 19009/04)
Judgment/Arrêt 13.5.2008 [Section IV]

Facts: The applicant and his wife were secure tenants under the Housing Act 1985 of a three-bedroom house belonging to the city council. The marriage broke down and the wife obtained an order requiring the applicant to leave the matrimonial home on grounds of domestic violence. After she and the children had been re-housed, the applicant moved back into the vacant house and did a considerable amount of renovation work. His relationship with his wife improved and she supported his application for an exchange of accommodation with another local-authority tenant, as the three-bedroom house was too big for him but he still required a home in the area so that his children could visit. In January 2002 a housing officer, having realised that the property was not in fact empty, visited the applicant's wife and got her to sign a notice to quit. The wife says that she was not advised and did not understand at that time that this would extinguish the applicant's right to live in the house or to exchange it. The local authority then sought a possession order which it obtained on appeal, the appellate court finding that the local authority had acted lawfully and that the notice to quit was effective even though it had been signed without an understanding of its consequences. That decision was upheld in judicial review proceedings brought by the applicant and again on appeal. The applicant was evicted from the house.

Law: The notice to quit and possession proceedings amounted to interference with the applicant's right to respect for his home. That interference was in accordance with the law and pursued the legitimate aims of protecting the local authority's right to regain possession of property from an individual who had no contractual or other right to be there and of ensuring that the statutory scheme for housing provision was properly applied. The Court noted that any person at risk of losing his home should be able to have the proportionality of the measure determined by an independent tribunal, even if, under domestic law, the right of occupation had come to an end. The legislature in the United Kingdom had set up a complex system for the allocation of public housing which included, under section 84 of the Housing Act 1985, provisions to protect secure tenants with public authority landlords. Had the local authority sought to evict the applicant in accordance with that statutory scheme, the applicant could have asked the court to examine his personal circumstances, including the need to provide accommodation for his children and whether his wife had really left the family home because of domestic violence. However, the local authority had chosen to bypass that statutory scheme by asking the applicant's wife to sign a common law notice to quit, which had resulted in the termination of the applicant's right, with immediate effect, to remain in the house. The authority, in the course of that procedure, had not given any consideration to the applicant's right to respect for his home. Nor had the ensuing possession proceedings or judicial review proceedings provided any opportunity for an independent tribunal to examine whether the applicant's loss

of his home was proportionate to the legitimate aims pursued. It was immaterial whether or not the wife had understood or intended the effects of the notice to quit. The procedural safeguards under the summary procedure available to a landlord where one joint tenant served a notice to quit were inadequate.
Conclusion: violation (unanimously).

Article 41 – EUR 2,000 in respect of non-pecuniary damage.

ARTICLE 13

EFFECTIVE REMEDY / RECOURS EFFECTIF
Denial of access to intelligence that had resulted in an asylum seeker's exclusion on national security grounds: *admissible*.
Refus d'accorder l'accès aux renseignements secrets à l'origine d'une décision d'expulsion d'un demandeur d'asile pour des raisons de sécurité nationale : *recevable*.

RAMZY - Netherlands/Pays-Bas (N° 25424/05)
Decision/Décision 27.5.2008 [Section III]

(See Article 3 above / voir l'article 3 ci-dessus).

ARTICLE 14

DISCRIMINATION (Article 8)
Prisoner's inability to make telephone calls to his partner because they were not married: *violation*.
Impossibilité pour un détenu d'appeler sa compagne au téléphone au motif qu'il n'était pas marié avec elle : *violation*.

PETROV - Bulgaria/Bulgarie (N° 15197/02)
Judgment/Arrêt 22.5.2008 [Section V]

Facts: Between 2001 and 2003 the applicant served a prison sentence at Lovech Prison. During his stay, he was not allowed to send correspondence to the lawyer representing him in pending domestic proceedings and before the Court in sealed envelopes. His letters were systematically opened and checked by the prison authorities. Furthermore, while married inmates had the right to call their spouses from a private telephone booth twice a month, he was barred for a period of time from making calls to the mother of his child with whom he had been living for about four years on account of the fact that they were not married.

Law: Article 8 – The applicant complained about the monitoring of his correspondence, including with his lawyer. The monitoring was based on domestic law, which provided that the entirety of the prisoners' correspondence was to be screened, without distinguishing between different categories of correspondents. Moreover, the statutory provisions did not lay down any rules governing the implementation of such monitoring nor were the domestic authorities required to give reasons. Despite the existence of a certain margin of appreciation in this domain, and in the absence of any arguments by the authorities as to the indispensable nature of such a measure, the monitoring of the entirety of the applicant's correspondence did not correspond to a pressing social need and was not proportionate to the legitimate aim pursued.
Conclusion: violation (unanimously).

Article 14 in conjunction with Article 8 – The applicant also complained that, unlike married prisoners, he was not allowed to call his life-partner from the prison telephone. Notwithstanding the differences in legal status of married couples, as well the general acceptance of the institution of marriage, the applicant and

his partner were in a long-term relationship and had a child together. His situation was therefore substantially the same as that of married inmates. However, neither the domestic authorities nor the Government had advanced objective and reasonable justification for the difference in treatment of the applicant compared to married inmates. Despite the State's margin of appreciation, the Court did not consider it acceptable that married and unmarried prisoners with an established family life should receive such disparate treatment in terms of maintaining family ties while in custody.
Conclusion: violation (unanimously).

Article 41 – EUR 4,000 in respect of non-pecuniary damage.

DISCRIMINATION (Article 8)
Failure of domestic courts to impose sanctions in respect of works allegedly insulting to Roma: *communicated*.
Non-imposition de sanctions par les juridictions internes à raison de la publication d'ouvrages censés insulter les Roms : *communiquée*.

AKSU - Turkey/Turquie (N° 4149/04 and 41029/04)
[Section II]

The applicant, who is a Turkish national of Roma origin, brought two civil actions in the Ankara Civil Court claiming that two publications financed by the Ministry of Culture – a book entitled "Gypsies of Turkey" and a dictionary (the Turkish Dictionary for Pupils) – contained expressions amounting to discrimination against Roma and an insult to his identity as a Roma. The court dismissed his claims finding that the book was the result of scientific research into the social structures of Roma, and the definitions and the expressions contained in the dictionary were based on historical and sociological realities, so that none of the publications had amounted to an insult of the applicant.

Cases *communicated* under Article 14 read in conjunction with Article 8 of the Convention, with specific questions concerning the applicant's victim status.

ARTICLE 35

Article 35 § 1

RECOURS INTERNE EFFICACE / EFFECTIVE DOMESTIC REMEDY (France)
Existence en droit interne de recours spécifiques de nature à remédier à la violation de présomption d'innocence : *irrecevable*.
Specific remedies available in domestic law for violations of the presumption of innocence: *inadmissible*.

MARCHIANI - France (N° 30392/03)
Décision/Decision 27.5.2008 [Section V]

(Voir l'article 6 § 2 ci-dessus / see Article 6 § 2 above).

Article 35 § 3

COMPETENCE *RATIONE TEMPORIS* / COMPÉTENCE *RATIONE TEMPORIS*
Alleged violation based on an administrative decision taken before the entry into force of the Convention, whereas the final judicial decision was taken thereafter: *inadmissible*.
Violation alléguée tenant à une décision administrative prise avant la date d'entrée en vigueur de la Convention, la décision judiciaire définitive ayant été rendue après cette date : *irrecevable*.

MELTEX LTD - Armenia/Arménie (N° 37780/02)
Decision/Décision 27.5.2008 [Section III]

The applicant, a television company, was granted a five-year broadcasting licence in 1997 by the Ministry of Communication. A Law on Television and Radio was passed in 2000 introducing a new licensing procedure and entrusting the granting of licences to the National Television and Radio Commission ("the NTRC"). The applicant's licence was renewed by the Commission until licensing competitions took place. In 2002 several competitions were announced, including one for the frequency which had until then been used by the applicant. The applicant and two other companies submitted bids. On 2 April 2002 the NTRC announced that another company had won the call for tender. Thereafter, the electricity supply to the applicant company's transmitter was cut off and its broadcasts ceased. The applicant unsuccessfully sought to annul that decision before the courts. The final decision was given by the Court of Cassation on 14 June 2002. Subsequently, the applicant submitted bids for other frequency competitions, but on each occasion was refused a licence.

Inadmissible: The Convention had entered into force in respect of Armenia on 26 April 2002. The NTRC's decision to grant broadcasting licence to a company other than the applicant company, thereby rejecting the latter's bid for a broadcasting a licence, had been taken on 2 April 2002. The applicant company had instituted court proceedings seeking an order annulling that decision. The final decision had been taken by the Court of Cassation on 14 June 2002, that is, after the Convention's entry into force in respect of Armenia. However, the applicant company's bid for a licence had been refused by the NTRC's decision, not in the course of the subsequent court proceedings. The NTRC was the sole authority vested with power to examine the applicant company's bid for a broadcasting licence and to decide whether to grant or refuse such a licence. The domestic courts could review the legality of that decision but not examine the competitive bids and decide which company was to be granted a licence. The alleged interference with the applicant company's rights guaranteed by Article 10 had therefore taken place on the date of the NTRC's decision, namely 2 April 2002, which preceded the date of the Convention's entry into force in respect of Armenia. The fact that the final judicial decision had been taken after that date did not bring the alleged interference within the Court's temporal jurisdiction. Furthermore, that decision concerned only the entitlement to conduct broadcasting on band 37 and had not amounted to a general prohibition on the applicant company's right to broadcast as such. Nor had the applicant company been prevented from submitting tenders for other available bands. The fact that the NTRC had rejected all its bids within a certain period did not imply that the decision of 2 April 2002 had given rise to a continuing situation. All the NTRC's decisions in respect of the subsequent calls for tenders had been adopted on identifiable dates and were the object of a separate application before the Court. The NTRC's decision of 2 April 2002 had been an instantaneous act which, despite its ensuing effects, had not in itself given rise to any possible continuing situation: *incompatible* ratione temporis.

ARTICLE 38

FURNISH ALL NECESSARY FACILITIES /
FOURNIR TOUTES FACILITÉS NÉCESSAIRES
Government's refusal to disclose documents requested by the Court in connection with Article 2 complaints: *inferences drawn under Article 2*.
Refus du Gouvernement de communiquer les documents demandés par la Cour relativement aux griefs tirés de l'article 2 : *conclusions tirées sur le terrain de l'article 2*.

BETAYEV/BETAÏEV and/et BETAYEVA/BATAÏEVA - Russia/Russie (N° 37315/03)
GEKHAYEVA/GUEKHAÏEVA and Others/et autres - Russia/Russie (N° 1755/04)
IBRAGIMOV/IBRAGUIMOV and Others/et autres - Russia/Russie (N° 34561/03)
SANGARIYEVA/SANGARIEVA and Others/et autres - Russia/Russie (N° 1839/04)
Judgments/Arrêts 29.5.2008 [Section I]

(See Article 2 above / voir l'article 2 ci-dessus).

See also, for recent cases in which the Court found a failure to comply with Article 38: *Shamayev and Others v. Georgia and Russia* (no. 36378/02 – reported in Information Note no. 74); *Imakayeva v. Russia* (no. 7615/02 – Information Note no. 91); *Baysayeva v. Russia* (no. 74237/01 – Information Note no. 96); *Akhmadova and Sadulayeva v. Russia* (no. 40464/02 – Information Note no. 97); *Bitiyeva and X. v. Russia* (nos. 57953/00 and 37392/03 – Information Note no. 98); *Kukayev* and *Khamila Isayeva* (nos 29361/02 and 6846/02 – Information Note no. 102); and *Maslova and Nalbandov* (no. 839/02 – Information Note no. 104).

ARTICLE 46

GENERAL MEASURES / MESURES GÉNÉRALES
Ensure the effective protection of the right to a fair hearing in disciplinary proceedings against prisoners: *bring the national legislation in line with the principles set out in the European Prison Rules*.
Assurer la protection effective du droit à un procès équitable dans le cadre des procédures disciplinaires dirigées contre des détenus : *mettre la législation interne en conformité avec les règles pénitentiaires européennes*.

GÜLMEZ – Turkey/Turquie (N° 16330/02)
Judgment/Arrêt 20.5.2008 [Section II]

(See Article 6 above / voir l'article 6 ci-dessus).

ARTICLE 1 OF PROTOCOL No. 1 / ARTICLE 1 DU PROTOCOLE N° 1

POSSESSIONS / BIENS
No right under domestic law to a court award reflecting inflation: *inadmissible*.
Impossibilité pour un juge en vertu du droit interne d'accorder une indemnité tenant compte de l'inflation : *irrecevable*.

TODOROV - Bulgaria/Bulgarie (N° 65850/01)
Decision/Décision 13.5.2008 [Section V]

In 1997 the applicant brought an action against a municipality seeking restitution of the price paid by him under a contract concluded in 1990 and damages for breach of that contract. A district court granted his claim in part. In 1999 the award was increased on appeal. However, by then, owing to the depreciation of the currency, with accrued interest it represented in real terms but a fraction of the original claim.

Inadmissible: While it was true that the award had been made against the municipality as an administrative body, the facts concerned contractual relations between the applicant and the municipality. In accordance with the established practice of the Bulgarian courts, it was not possible to adjust claims. The applicant had no right under national law to obtain an award in damages reflecting inflation and, therefore, his claim for such an award did not constitute a "legitimate expectation" or "existing possessions", within the meaning of Article 1 of Protocol No. 1. That Article could not be interpreted as imposing an obligation on States to maintain the value of claims or apply an inflation-compatible default interest rate to private claims. The Court did not find any indication that the authorities had contributed to the loss of value of his claim. In particular, there had been no any unreasonable delays in the proceedings: *incompatible* ratione materiae.

RESPECT DES BIENS / PEACEFUL ENJOYMENT OF POSSESSIONS
Intérêts moratoires dus par un hôpital public à un taux inférieur à celui appliqué aux particuliers : *violation*.
Rate of default interest payable by State hospital lower than that payable by private individuals: *violation*.

MEÏDANIS - Grèce/Greece (N° 33977/06)
Arrêt/Judgment 22.5.2008 [Section I]

En fait : Le requérant saisit le tribunal de paix d'une demande contre l'hôpital public, dans lequel il travailla sur la base d'un contrat de droit privé à durée déterminée, tendant au paiement de salaires. Il demandait que cette somme soit majorée d'intérêts moratoires, selon les taux prévus par la loi relative aux taux d'intérêts pour les dettes entre particuliers ou les dettes des particuliers vis-à-vis des personnes morales de droit public. Dans son cas, ce taux serait de 27 % pour une partie de la période à prendre en considération et de 23 % pour le restant. Le tribunal reconnut l'obligation de l'hôpital de verser au requérant la totalité de la somme réclamée, majorée d'intérêts au taux légal de 6 % l'an, tel que prévu par la loi n° 496/1974 relative aux dettes des personnes morales de droit public. L'hôpital et le requérant interjetèrent appel. Le tribunal de grande instance considéra que la différenciation dans la détermination du taux des intérêts moratoires en fonction du débiteur profitait indûment aux personnes morales de droit public et n'était justifiée par aucun but d'intérêt public, le simple intérêt de trésorerie ne pouvant pas être considéré comme un tel but. Il conclut que l'application de la loi n° 496/1974 était contraire au principe de l'égalité des armes et portait violation des articles 6 § 1 de la Convention et 1 du Protocole n° 1. Dès lors, il réajusta les montants dus à titre d'intérêts moratoires. L'hôpital se pourvut en cassation. L'affaire fut renvoyée devant la formation plénière de la Cour de cassation pour se prononcer sur la conformité de la loi n° 496/1974 avec la Constitution et la Convention. Cette dernière jugea que, s'agissant des dettes de personnes morales de droit public, la détermination des intérêts moratoires à un taux inférieur à celui appliqué aux particuliers ne portait pas atteinte aux articles 6 § 1 de la Convention et 1 du Protocole n° 1. Tout en admettant que l'article 1 du Protocole n° 1 protégeait la propriété du créancier, elle affirma qu'il fallait également protéger les biens de l'hôpital pour lui permettre de servir sans entraves ses buts d'intérêt public. Ainsi, la Cour de cassation cassa l'arrêt attaqué et renvoya l'affaire devant le tribunal de grande instance pour un nouvel examen. Une opinion dissidente fut rédigée par huit magistrats.

En droit : Les juridictions saisies ont reconnu que l'hôpital avait une dette vis-à-vis du requérant et que cette somme devait être majorée d'intérêts moratoires. Elles avaient donc créé au profit du requérant une créance relative aux intérêts moratoires qui était suffisamment établie pour être exigible. La question se pose de savoir si le décalage entre le taux des intérêts moratoires applicable aux dettes de l'Etat et celui applicable aux dettes des particuliers a fait subir au requérant un préjudice allant à l'encontre des exigences de l'article 1 du Protocole n° 1. L'hôpital contre lequel s'est retourné le requérant ne fut pas appelé en l'espèce à agir comme détenteur de la puissance publique mais était assimilé à un employeur

privé. En effet, le litige était né dans le cadre d'un contrat de travail de droit privé, domaine dans lequel l'hôpital devait pouvoir assumer les mêmes devoirs vis-à-vis de ses employés que les autres employeurs du secteur privé, sans faire appel à des privilèges étatiques pour alléger ses dettes. Pourtant, invoquant son statut de personne morale de droit public, l'hôpital a réussi à bénéficier d'un taux presque quatre fois inférieur à celui appliqué aux particuliers pour la même période. La Cour se doit donc d'apprécier cette diminution de la créance du requérant qui se plaint de l'écart entre les taux selon l'identité du débiteur. Elle admet que les personnes morales de droit public puissent jouir, dans l'exercice de leurs fonctions, de privilèges et immunités leur permettant d'accomplir efficacement leurs missions de droit public. Toutefois, elle estime que la seule appartenance à la structure de l'Etat ne suffit pas en elle-même pour légitimer, en toutes circonstances, l'application de privilèges étatiques, mais il faut que cela soit nécessaire au bon exercice des fonctions publiques. Or, la Cour ne saurait accepter la thèse du Gouvernement, selon laquelle la différenciation dans la détermination du taux des intérêts moratoires était indispensable en l'espèce pour assurer le bon fonctionnement de l'hôpital. Comme l'ont bien exprimé le tribunal de grande instance et les magistrats de la Cour de cassation dans leur opinion dissidente, le simple intérêt de trésorerie de la personne morale de droit public ne peut pas être assimilé à un intérêt public ou général et ne peut pas justifier la violation du droit au respect des biens du créancier qu'entraîne la réglementation litigieuse. Par ailleurs, la Cour note que le Gouvernement n'avance aucun autre motif raisonnable et objectif de nature à justifier la distinction au regard des exigences de l'article 1 du Protocole n° 1. Ainsi, la détermination des intérêts moratoires dus par l'hôpital, personne morale de droit public, à un taux presque quatre fois inférieur à celui appliqué aux particuliers pour la même période, a porté atteinte au droit du requérant au respect de ses biens, au sens de l'article 1 du Protocole n° 1.
Conclusion : violation (unanimité).

Referral to the Grand Chamber / Renvoi devant la Grande Chambre

Article 43 § 2

The following case has been referred to the Grand Chamber in accordance with Article 43 §2 of the Convention:
L'affaire suivante a été déférée à la Grande Chambre en vertu de l'article 43 § 2 de la Convention :

MOOREN - Germany/Allemagne (N° 11364/03)
Judgment/Arrêt 13.12.2007 [Section V]

(See Article 5 § 1 above / voir l'article 5 § 1 ci-dessus).

Judgments having become final under Article 44 § 2 (c)[1]
Arrêts devenus définitifs en vertu de l'article 44 § 2 (c)

On 2 June 2008 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:
Le 2 juin 2008, le collège de la Grande Chambre a rejeté des demandes de révision des arrêts suivants, qui sont dès lors devenus définitifs :

A.B. – Pologne/Poland N° 33878/96)
ALEXANDROVA/ALEKSANDROVA – Russie/Russia (N° 28965/02)
BIONDIĆ – Croatie/Croatia (N° 38355/05)
BOCELLARI et/and RIZA – Italie/Italy (N° 399/02)
CRESCI – Italie/Italy (N° 35783/03)
DRIZA – Albanie/Albania (N° 33771/02)
DYBEKU – Albanie/Albania (N° 41153/06)
ERKAN SOYLU – Turquie/Turkey (N° 74657/01)
EVCIMEN – Turquie/Turkey (N° 21865/02)
GRICHINE/GRISHIN – Russie/Russia (N° 30983/02)
ISMAÏLOVA/ISMAILOVA – Russie/Russia (N° 37614/02)
JOSEPHIDES – Chypre/Cyprus (N° 33761/02)
K.Ö – Turquie/Turkey (N° 71795/01)
KHAMIDOV – Russie/Russia (N° 72118/01)
KHAMILA ISSAÏEVA/ISAYEVA – Russie/Russia (N° 6846/02)
KNIAZEV/KNYAZEV – Russie/Russia (N° 25948/05)
KÖSEOĞLU – Turquie/Turkey (N° 73283/01)
KOUKAÏEV/KUKAYEV – Russie/Russia (29361/02)
LEBEDEV – Russie/Russia (N° 4493/04)
LIND – Russie/Russia (N° 25664/05)
LIOU/LIU et/and /LIOU/LIU – Russie/Russia (N° 42086/05)
LUCZAK – Pologne/Poland (N° 77782/01)
MASLENKOVI – Bulgarie/Bulgaria (N° 50954/99)
MAUMOUSSEAU et/and WASHINGTON – France (N° 39388/05)
MELEGARI – Italie/Italy (N° 17712/03)
MERAL – Turquie/Turkey (N° 33446/02)
NACARYAN et/and DERYAN – Turquie/Turkey (N° 19558/02 et/and 27904/02)
NANKOV – l'ex-République Yougoslave de Macédoine/the former Yugoslav Republic of Macedonia (N° 26541/02)
NUR RADYO VE TELEVIZIYON YAYINCILIĞI A.Ş. – Turquie/Turkey (N° 6587/03)
NURETTIN ALDEMIR et autres/and Others – Turquie/Turkey (N°s 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 et/and 32138/02)
OGANOVA – Géorgie/Georgia (N° 25717/03)
OOO PKG « Sib Yukass » – Russie/Russia (N° 34283/05)
OREL – Ukraine (N° 39924/02)
OUSTALOV/USTALOV – Russie/Russia (N° 24770/04)
ÖZGÜR RADYO – SES RADYO TELEVIZYION YAYIN YAPIM ve TANITIMI A.Ş. – Turquie/Turkey (N° 11369/03)
PASCULLI – Italie/Italy (N° 36818/97)

[1] The list of judgments having become final pursuant to Article 44(2)(b) of the Convention has been discontinued. Please refer to the Court's database HUDOC which will indicate when a given judgment has become final.
Les affaires ayant donné lieu à des arrêts devenus définitifs en application de l'article 44(2)(b) de la Convention ont été closes. Veuillez consulter HUDOC, la base de données de la Cour, afin de savoir si et à quelle date un arrêt est devenu définitif.

PAYKAR YEV HAGHTANAK LTD – Arménie/Armenia (N° 21638/03)
PERRY – Lettonie/Latvia (N° 30273/03)
POPOVICI – Moldova (N°s 289/04 et/and 41194/04)
RAMADHI et/and 5 autres/Others – Albanie/Albania (N° 38222/02)
RYDZ – Pologne/Poland (N° 13167/02)
S.C.I. PLÉLO-CADIOU – France (N° 12876/04)
SAMPSONIDIS et autres/and Others – Grèce/Greece (N° 2834/05)
ŞENCAN – Turquie/Turkey (N° 7436/02)
SOUBOTCHEVA/SUBOCHEVA – Russie/Russia (N° 2245/05)
STOJKOVIC – l'ex-République Yougoslave de Macédoine/the former Yugoslav Republic of Macedonia (N° 14818/02)
TIMPUL INFO-MAGAZIN et/and ANGHEL – Moldova (N° 42864/05)
TOMAŽIČ – Slovénie/Slovenia (N° 38350/02)
URBÁRSKA OBEC TRENČIANSKE BISKUPICE – Slovaquie/Slovakia (N° 74258/01)
Z.A.N.T.E. – MARATHONISI A.E. – Grèce/Greece (N° 14216/03)