PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.1 – Summaries of Judgements and Admissibility Decisions (January–June 2001)

1. Court Judgements

♦ ***Hilal v. United Kingdom*, Judgement of 6 March 2001, Appl. No. 45276/99**

The applicant, **a Tanzanian national from Zanzibar**, sought **asylum** in the United Kingdom. He claimed to be a member of the Civic United Front (CUF) who had been arrested because of his political activities and tortured while in detention. He fled to the United Kingdom after his release. His asylum application was rejected by the UK authorities in the first instance and at appeal because of lack of evidence and credibility. The UK authorities also believed that even if the applicant's account of events were true, he had an internal flight alternative in mainland Tanzania and notified him that he would be removed to Zanzibar.

In his complaint before the Court, the applicant claimed that his expulsion would constitute a violation of **Articles 3 (prohibition of torture, inhuman or degrading treatment), 6 (right to a fair trial)** and **8 (right to respect for private and family life**) of the ECHR. He also argued that, in violation of **Article 13 (right to an effective remedy**), he had no effective domestic remedy against the decision to deport him.

The Court reviewed the evidence provided by the applicant and, unlike the UK authorities, found that there was no basis to consider the evidence submitted forged or fabricated. Considering the fact that the UK authorities had not substantiated their doubts concerning the evidence submitted, the Court concluded that the applicant's statement of events was credible. On the issue of **internal flight**, the Court considered the fact that the police in mainland Tanzania were in fact institutionally linked to the police in Zanzibar and that there was a possibility of "extradition" between mainland Tanzania and Zanzibar. It determined that **such an alternative did not in fact exist** in the present case. The Court concluded that given the treatment inflicted by the authorities on the members of the CUF, the **expulsion of the applicant to Tanzania would constitute a violation of Article 3 (prohibition of torture, inhuman or degrading treatment)** of the ECHR. In the light of its conclusions on Article 3, the Court found that no separate issues arose under Article 6 and 8 of the ECHR. Concerning the part of the claim based on Article 13, the Court determined that the domestic judicial review process offered all the guarantees of an effective remedy and that there was no violation of that Article.

♦ ***Dougoz v. Greece*, Judgement of 6 March 2001, Appl. No. 40907/98**

The applicant, a **national of Syria**, had left that country for Greece because he was accused of a national security offence in Syria, for which he said he had been found guilty and sentenced to death. In 1989, he was **recognised as a mandate refugee by UNHCR**. In 1991, his leave to remain in Greece expired, after which he was arrested for theft and bearing arms without authorisation and placed in detention on remand. Found guilty in 1993, he was released from prison in June 1994, having served part of his sentence, and ordered to leave Greece. He then applied to the Greek authorities for refugee status, which rejected the claim as abusive. Although expelled to a part of former Yugoslavia in September 1994, he returned to Greece and in 1995 was arrested for drug-related offences and sentenced to three years' imprisonment in 1996. In June 1997, he asked to be released and sent back to Syria, where he said he had been granted a reprieve. A domestic court approved his release and expulsion to Syria. Upon his release, he was placed in police detention pending expulsion. In November 1997, he asked to be sent back to another country than Syria, where he now said he faced the death penalty. In February 1998, he applied for the order for his expulsion to be lifted but this was rejected in May by the same domestic court. Further requests in July to Ministers were to no avail and he was expelled to Syria in December 1998.

Before the Court, the applicant claimed that the detention conditions in Greece constituted a violation of **Article 3** of the ECHR. Additionally, he argued that the decision to detain him contravened the provisions of **Article 5** of the ECHR.

On the first part of the claim, the Court, after examining the material situation in the Alexandras and Drapetsona police stations where he had been held, considered that his treatment there amounted to degrading treatment in **violation of Article 3** of the ECHR. Concerning the issue of lawfulness of detention, the Court noted that while *the decision to expel* was taken by a domestic court, *the decision to detain* was taken by an administrative authority, which, in the absence of a law, acted on the basis of a 1993 Opinion of the Deputy Public Prosecutor. The Court considered that such an Opinion did not constitute a "law" of sufficient "quality" within the meaning of the Court's jurisprudence. It concluded that there was a **violation of Article 5(1)** of the ECHR. Moreover, the applicant's requests for review of his detention, lodged with the Ministers of Justice and Public Order, depended on the Ministers' discretionary leniency. Therefore, the Court also considered that **there was a violation of Article 5(4)** of the ECHR in that such a procedure could not be considered a proper judicial review process.

♦ ***Baumann v. France*, Judgement of 22 May 2001, Appl. No. 33592/96**

The applicant, a **German national**, had his **passport confiscated** by the French authorities which were investigating a criminal offence. The confiscation took place in France, while the applicant was hospitalised in Germany. Since he was not called upon either as a witness or as an accused in the judicial proceedings taking place in France, he requested the return of his passport. His various demands were all rejected.

Before the Court he argued, *inter alia,* that the confiscation of his passport and the refusal to return it constituted a restriction upon **his freedom of movement** in contravention with the provisions of **Article 2 of Protocol No. 4** to the ECHR. The Court considered the fact that paragraphs 1 and 2 of Article 2 of Protocol No. 4 prohibit the adoption of any measures which would prevent or restrain the right of a person to move freely in a given country, including his or her own, or to leave such a country. Restrictive measures can only be justified under the provisions of Article 2(3) of the Protocol. The Court found that **a measure confiscating an identity document such as a passport undoubtedly amounted to an interference with the exercise of liberty of movement**. In the present case, the applicant was prevented from leaving Germany and going to an EU or a non-EU country. In addition, the Court decided that, although the measure had a legal basis in French law, it was not a measure "necessary in a democratic society" proportionate to the aims pursued and could not be justified by one of the exceptions set out in Article 2(3).

The Court judged that there was indeed a **violation of Article 2 of Protocol No. 4** to the ECHR.

- ***Bensaid v. United Kingdom*, Judgement of 6 February 2001, Appl. No. 44599/98**

The applicant, an **Algerian national,** had been married to a British national since 1993 and as a result had been given indefinite leave to remain in the United Kingdom. After a visit to Algeria, the UK immigration authorities admitted him temporarily but then refused leave to enter in March 1997 on the ground that his indefinite leave to remain had been obtained by deception, the marriage being one of convenience. He was given notice of the authorities' intention to remove him from the United Kingdom. Before the domestic courts, **he argued that he suffered from schizophrenia and that his expulsion to Algeria would lead to a deterioration in his mental health** given the situation prevailing there. The UK authorities did not contest the fact that the applicant's state of health was serious, since it was substantiated by medical reports, but they argued that he could obtain the necessary treatment in his country of origin.

Before the Court, the applicant relied on the jurisprudence of *D. v. United Kingdom*[1] and maintained that it would be difficult for him to obtain in Algeria the degree of support and access to medical facilities he had in the United Kingdom. He argued that his return to Algeria would lead to a deterioration in his health and this would constitute a violation of **Article 3** of the ECHR. The applicant also argued that his expulsion would constitute a violation of **Article 8** of the ECHR, since the effect of such an expulsion on his moral and physical integrity would amount to a violation of his right to private life. Finally, he complained of a violation of **Article 13.**

[1] *D. v. United Kingdom*, Judgement of 2 May 1997, Appl. No. 30240/96. For a summary, see part 4.1 of this Manual on selected case law on Article 3 of the ECHR.

With regard to the complaint under Article 3, the Court admitted that the applicant's situation in Algeria would be less favourable than in the United Kingdom, but it recalled that this was not decisive from the point of view of Article 3. The Court considered as purely speculative the assertions that the applicant's health would deteriorate if returned to Algeria and that he would not receive adequate care or support. It further considered that the alleged impact of the prevailing circumstances in the region of origin, including the security situation, on the applicant's health was also speculative. For the Court, this case did not disclose the exceptional circumstances of *D. v. United Kingdom*, where the applicant was in the final stages of AIDS. It concluded that there would be **no violation of Article 3** of the ECHR, if the applicant were sent back to Algeria. As regards the complaint under Article 8, the Court acknowledged that mental health is an important component of private life, but found that, given the determination under Article 3, expulsion in this case **would not constitute a violation of Article 8** of the ECHR. The complaint based on **Article 13** was also **not upheld**.

♦ ***Cyprus v. Turkey*, Judgement of 10 May 2001, Appl. No. 25781/94**

This inter-State case relates to the situation that exists in **northern Cyprus** since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus. In the proceedings, Cyprus contended that Turkey was accountable under the ECHR for the violations alleged, notwithstanding the proclamation of the "Turkish Republic of Northern Cyprus" in November 1983.

The Cypriot complaint before the Court related to (1) the issue of Greek-Cypriot missing persons; (2) the home and property of the displaced persons; (3) the living conditions of Greek Cypriots in northern Cyprus; and (4) complaints relating to Turkish Cypriots living in northern Cyprus.

In the proceedings before the Grand Chamber, the Court held that there had been the following **14 violations of the ECHR**:

1. *Greek-Cypriot missing persons and their relatives*
– a continuing violation of **Article 2 (right to life)** of the ECHR concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances;
– a continuing violation of **Article 5 (right to liberty and security of person)** concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance;
– a continuing violation of **Article 3 (prohibition of torture, inhuman or degrading treatment)** in that the silence of the Turkish authorities in the face of the real concerns of the relatives had attained a level of severity which could only be categorised as inhuman treatment.

2. ***Home and property of displaced persons***
– a continuing violation of **Article 8 (right to respect for private and family life, home and correspondence)** concerning the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus;
– a continuing violation of **Article 1 of Protocol No. 1 (protection of property)** concerning the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights;
– a violation of **Article 13 (right to an effective remedy)** concerning the failure to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under Article 8 of the ECHR and Article 1 of Protocol No. 1.

3. ***Living conditions of Greek Cypriots in Karpas region of northern Cyprus***
– a violation of **Article 9 (freedom of thought, conscience and religion)** in respect of Greek Cypriots living in northern Cyprus, concerning the effects of restrictions on freedom of movement which limited access to places of worship and participation in other aspects of religious life;
– a violation of **Article 10 (freedom of expression)** in respect of Greek Cypriots living in northern Cyprus in so far as school books destined for use in their primary schools were subject to excessive measures of censorship;
– a continuing violation of **Article 1 of Protocol No. 1** in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured if they left that territory permanently and in that, if they died, inheritance rights of relatives living in southern Cyprus were not recognised;
– a violation of **Article 2 of Protocol No. 1 (right to education)** in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary school facilities were available to them;
– a violation of **Article 3** of the ECHR in that the Greek Cypriots living in the Karpas area of Northern Cyprus had been subjected to discrimination amounting to degrading treatment;
– a violation of **Article 8** concerning the right of Greek Cypriots living in northern Cyprus to respect for their private and family life and to respect for their home;
– a violation of **Article 13** by reason of the absence, as a matter of practice, of remedies in respect of interferences by the authorities with the rights of Greek Cypriots living in northern Cyprus under Articles 3, 8, 9 and 10 of the ECHR and Articles 1 and 2 of Protocol No. 1 to the ECHR.

4. ***Rights of Turkish Cypriots living in northern Cyprus***
– a violation of **Article 6 (right to a fair trial)** on account of the legislative practice of authorising the trial of civilians by military courts.

The Court further held that there had been no violation concerning a number of other complaints, including all those raised under Article 4 (prohibition of slavery and forced labour), Article 11 (freedom of assembly and association), Article 14 (prohibition of discrimination), Article 17 (prohibition of abuse of rights) and Article 18 (limitation on use of restrictions on rights) read in conjunction with all those provisions.

2. Court Decisions

A. Cases declared admissible

♦ ***Amrollahi v. Denmark*, Decision of 28 June 2001, Appl. No. 56811/00**

The applicant, Davood Amrollahi, is an **Iranian national** who **deserted from the Iranian army** in 1987 and arrived in Denmark in 1989, after spending some time in Turkey and Greece. He was granted a residence and a work permit, which became permanent in 1994. In 1992, he began cohabiting with a Danish partner, whom he later married and with whom he had two children. In 1997, the applicant was sentenced for drug trafficking to three years' imprisonment, **expelled from Denmark with a life-long ban on his return** there. In his appeal, the applicant argued that the expulsion order should not be implemented because he was now married and he risked ill-treatment in Iran, but this appeal was rejected by the High Court of Western Denmark. Before the aliens' authorities, the applicant held that if returned to Iran, he would be subjected to persecution. The Aliens' Appeals Board decided, based on information received from UNHCR and the Danish diplomatic representation in Teheran, Iran, that there was no risk of persecution due to the ending of the Iran-Iraq conflict. The Aliens' Appeals Board also found that there was no risk that the Iranian authorities would learn about the applicant's sentence in Denmark and consequently inflict upon him a second sanction.

His claim before the Court was based *inter alia* on **Articles 3, 5 and 8** of the ECHR, the latter on the grounds that if deported he would lose contact with his wife, children and a stepdaughter.

Concerning Article 3, the Court shared the Danish Government's opinion that since the conflict between Iran and Iraq was over no severe or disproportionate sanction would be taken against the applicant. On the issue of double punishment for the offence committed in Denmark, the Court also agreed that since the Iranian authorities are not aware of the reasons for the applicant's expulsion from Denmark, there was no real risk of treatment contrary to the ECHR. It therefore found that the part of the **claim based on Article 3 was inadmissible**. Turning to the issue of detention, the applicant had been detained from December 1998 until May 2000. The Court found that throughout that period action was being taken with a view to expulsion and that the various appeals against the expulsion order were processed without delay and with due diligence. The **detention** was therefore **in accordance with Article 5(1)(f)** of the ECHR, so this part of the complaint was also inadmissible. On **Article 8**, in light of the parties' submissions, the Court decided that the case should be examined on the merits and therefore declared this part of the complaint **admissible**.[2]

[2] The Judgement in this case was handed down on 11 July 2002 and is summarised in the case law update for July–December 2002 in part 5.4 of this Manual.

♦ ***Ilaşcu and Others v. Moldova and Russian Federation*, Decision of 4 July 2001, Appl. No. 48787/99**

The applicants, Ilie Ilaşcu, Alexandru Leşco, Andrei Ivanţoc and Tudor Petrov-Popa, were political leaders of the Popular Front, a Moldovan political party in favour of the reunification of Moldova with Romania. They were arrested in Tiraspol, Transdniestria, Moldova, in June 1992 by the Transdniestrian authorities. They were accused of various illegal activities against the Moldovan Republic of Transdniestria (MRT). In December 1993, one of the applicants to death and the three others to terms of imprisonment of between 12 and 15 years. This judgement was considered unlawful by the political and judicial authorities of the Republic of Moldova, but no remedial action was taken.

Before the Court, the applicants claimed that their detention had no legal basis, since it was decided by a de facto authority; that they were ill-treated by the Transdniestrian authorities; that they did not have a fair trial; that their right to private life was violated, since they could not correspond freely while in detention, and that the confiscation of their property was illegal. The case was thus based on **Articles 2, 3, 5, 6 and 8 of the ECHR and Article 1 Protocol No. 1** to the ECHR. The applicants lodged their claim both against the Republic of Moldova and the Russian Federation, which they considered to be the de facto authority in the MRT.

During the admissibility procedure, the Republic of Moldova cited a declaration which it had made upon accession to the ECHR where it had stated that the territory of the MRT should not be considered as coming under its jurisdiction because of the political situation prevailing there. The Court decided that such a declaration could not be considered as a reservation in the sense of Article 57 of the ECHR and that it was of a too general character to be considered valid. Concerning the question of whether the impugned acts could fall within the Russian Federation's jurisdiction even if they had occurred outside Russian territory, the Court found that the issues were so closely bound up with the merits of the case that it was inappropriate to determine them at this stage of the proceedings. Therefore, the case was declared **admissible on all grounds with respect to both Moldova and the Russian Federation**.[3]

♦ ***Al-Nashif and Others v. Bulgaria*, Decision of 25 January 2001, Appl. No. 50963/99**

The first applicant, Daruish Al-Nashif, was a **stateless person of Palestinian origin** who resided legally in Bulgaria with his wife and two children, who were born in Bulgaria and had Bulgarian nationality (the two children being the second and third applicants). In April 1999, the Bulgarian authorities **revoked the first applicant's permanent residence permit for national security reasons**, on the ground that he was teaching Islam without permission. In June 1999, further decisions were taken to detain and to deport him; all these decisions were served on the applicant without an explanation as to their reasons. The applicant appealed against the order revoking his

[3] As of March 2003, this case was still ongoing before the Court.

residence permit but according to Bulgarian law decisions adopted in cases involving national security issues were not subject to judicial review. The decision to detain him was considered lawful, while the domestic courts made no determination concerning the legality of the deportation order. The applicant was deported to Syria in July 1999.[4]

Before the Court, the applicant complained that his detention contravened **Article 5** of the ECHR, both because of its lack of legal basis and its length. He argued that the absence of judicial review of the order revoking the residence permit represented a violation of **Article 6**, that his deportation violated **Article 8**, and that all the measures taken against him were in contravention of **Article 9 (freedom of religion)**.

The Court decided that the part of the complaint based on **Article 5(1)(f)** of the ECHR was **inadmissible** since the decision to detain the applicant had a legal basis in domestic law and the expulsion procedure was carried out with due diligence. The Court declared **admissible** the argument concerning the **impossibility of reviewing the lawfulness of this detention (under Article 5(4))**. In keeping with its jurisprudence on the non-applicability of **Article 6** to immigration procedures, the Court declared **inadmissible** the part of the claim alleging that the applicant did not have a fair trial when he contested the various residence revocation and detention orders. Lastly, it declared the case **admissible in relation to Articles 8, 9 and 13** of the ECHR.[5]

♦ ***Nivette v. France*, Decision of 14 December 2000, Appl. No. 46221/99**

The applicant, a **United States national**, was arrested in France pending **extradition to the United States**, where he was accused of murder. He opposed his extradition, claiming that if found guilty he would be sentenced to capital punishment or to life imprisonment without any possibility of early release and that both sentences were contrary to French law and the ECHR. The French authorities received assurances from the General Prosecutor of Sacramento in California that he would not request the death penalty and that in any case there were no special circumstances in the applicant's case that would require the application of the death penalty. Based on these assurances, the French jurisdictions considered extradition could be carried out and that life imprisonment was neither contrary to French *ordre public* nor to the ECHR.

Before the Court, the applicant claimed that his extradition to the United States would constitute a violation of **Article 1 of Protocol No. 6** to the ECHR, since he could be sentenced to death. If he were not he claimed that his extradition would be contrary to **Article 3** of the ECHR since he risked life imprisonment without any possibility of early release.

[4] His wife left Bulgaria with the two children in June 2000, as she was unable to support her family alone.
[5] The Judgement in this case was handed down on 20 June 2002 and is summarised in the case law update for January–June 2002 in part 5.3 of this Manual.

The Court considered that the **assurances given by the General Prosecutor were binding** and that therefore there was no real risk of a violation of Article 1 of Protocol No. 6 to the ECHR. On the issue of **life imprisonment without any possibility of early release**, however, **the Court found that it did not have sufficient information to consider its compatibility with Article 3** of the ECHR and adjourned examination of this part of the complaint pending reception of further information.[6]

B. Cases declared inadmissible

♦ ***Xhavara and Others v. Italy and Albania*, Decision of 11 January 2001, Appl. No. 39473/98**

The applicants are **Albanian nationals** who were on the *Kater I Rades*, a ship carrying illegal immigrants to Italy which sank after a collision with an Italian military vessel, causing the death of a number of passengers.

The applicants argued before the Court that the collision engaged Italy's responsibility *inter alia* under **Articles 2, 3, and 5(1)**, of the ECHR and **Article 2(2) of Protocol No. 2 (right to leave one's country)** to the ECHR.

Concerning the part of the complaint based on Article 2 of the ECHR, the Court noted that domestic procedures, to which the applicants were parties, were still on-going and declared this part inadmissible for non-exhaustion of domestic remedies. The same conclusion was reached regarding the alleged violation of Article 3. As to Article 5, the Court decided that the applicants had not been placed in detention and that there was therefore no violation of this provision. The applicants' invocation of **Article 2(2) of Protocol No. 4** was on the ground that the interception activities of the Italian authorities, which were based on a bilateral convention with Albania, prevented them from leaving their country. The Court took the view, however, that the **interception activities which extended to international waters and to the territorial waters of Albania, were not aimed at preventing the Albanians from leaving their country but rather at preventing them from entering Italian territory.** It therefore found that Article 2(2) of Protocol No. 4 was not applicable. The case was declared **inadmissible on all grounds**.

♦ ***Ismail Ismaili v. Germany*, Decision of 15 March 2001, Appl. No. 58128/00**

The applicant, a **Moroccan national**, was **arrested in Germany pending his extradition** to Morocco, where he was accused of a criminal offence. While in Germany, he made an asylum claim, which was rejected on the basis that what he feared in his country of origin was prosecution not persecution.

[6] The case was finally declared inadmissible on 3 July 2001. The Court then determined that the assurances obtained by the French government were such as to avert the danger of the applicant's being sentenced to life imprisonment without any possibility of early release and that there was therefore no serious risk a violation of Article 3.

After exhaustion of his domestic recourses against the extradition order, he applied to the Court arguing that his return to Morocco would contravene **Article 2(1)** of the ECHR since he would face the death penalty. In addition, he complained that even if he were only sentenced to a term of imprisonment this would still constitute a violation of **Article 3** of the ECHR because of the detention conditions in Morocco.

On the first part of the claim, the Court decided to requalify the legal basis of the application and to examine it rather under **Article 1 of Protocol No. 6** to the ECHR, which prohibits the death penalty. It found that the Moroccan authorities had given assurances that such a penalty was not applicable to the kind of crime allegedly committed by the applicant. On the issue of treatment in Moroccan prisons, the Court concluded that there was no reason to believe that the applicant would be exposed to a serious risk of being mistreated. The application was declared **inadmissible on both grounds**.

C. Cases struck off the list

♦ ***Yang Chun Jin v. Hungary*, Judgement of 8 March 2001, Appl. No. 58073/00**

The applicant, Yang Chun Jin *alias* Yang Xiaolin, was a dual national of **China and Sierra Leone,** whose **extradition was requested by China** when a four-year prison sentence he was serving in Hungary came to an end. Before the Court, the applicant claimed that he might face an unfair trial, be detained under harsh conditions, subjected to torture or sentenced to death contrary to **Articles 3 and 6** of the ECHR and **Article 1 of Protocol No. 6** to the ECHR. In spite of the fact that the Hungarian authorities obtained formal assurances from the Chinese authorities that the applicant would have a fair trial and that he would not be sentenced to death, and if he were, that the sentence would not be carried out, they decided to refuse to extradite him to China. The applicant left for Sierra Leone and the case before the Court was therefore struck off the list.

D. Friendly settlements

Nothing to report.

E. Applications communicated to governments

♦ ***Chandra, H. W. A., and N. Tjonadi v. The Netherlands*, Appl. No. 53102/99**

In 1992, the first applicant left Indonesia and settled in the Netherlands. Before leaving Indonesia, she had started divorce proceedings, her husband being the father of her children, the four other applicants. The children stayed with their father in Indonesia. The first applicant continued the divorce proceedings from the Netherlands. In 1993, she obtained custody of her children and, in 1995, she was granted guardianship of them. She later obtained Netherlands nationality. In March 1997, the children entered the country with a tourist visa and have stayed with the first applicant ever since. Their application for a residence permit was rejected by the

State Secretary of Justice who considered that the criteria for family reunification were not met. The children filed an objection against the refusal; they were told by the State Secretary that they were not allowed to await the outcome of their objection in the Netherlands. In October 1997, their objection was rejected by the State Secretary. The children appealed to Regional Court, requesting a provisional measure allowing them to remain on the territory until their appeal was decided upon. In March 1999, the Regional Court rejected the appeal and the request for a provisional measure. It took into consideration, *inter alia*, the fact that the first applicant had only started in 1997 to take concrete steps to have her children join her, although she had obtained custody of them in 1993 and guardianship in 1995. It also considered that there were no other grounds, such as international obligations, "essential interests of the Netherlands" or humanitarian grounds, which would have justified the children's residence in the Netherlands. The case was communicated to the Netherlands Government under **Article 8** of the ECHR.

♦ ***Kovacic, Mirkonjic, and Golubovic v. Slovenia*, Appl. No. 44574/98; 45133/98; 48316/99**

All three applicants live in Croatia and had foreign currency accounts in the Croatian branch of a Slovenian bank prior to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Following the break up of the SFRY, the applicants wanted to withdraw their savings but the bank informed them that it did not have the money, which had been transferred to the National Bank of the SFRY during the financial crisis of 1989. They received positive decisions from Croatian jurisdictions, but the Slovenian bank invoked the lack of a succession agreement between the states of the former SFRY to justify the impossibility of delivering the money. The complaints were communicated to the Slovenian Government under **Article 1 Protocol No. 1** to the ECHR (protection of property).

F. Rule 39 of the Rules of the Court – Interim measures

♦ ***Peñafiel Salgado v. Spain*, Appl. No. 65964/01**

The applicant was formerly a banker in Ecuador. In August 1998, he migrated to Spain when the banks came under scrutiny for their role in the outbreak of the recession affecting Ecuador. Following the issuance of an extradition request by Ecuador, he applied for asylum in Spain, but was arrested in Lebanon while on a business trip there. Ecuador requested his extradition from Lebanon. Although he had filed an application for asylum with the Spanish Embassy in Beirut and despite the fact that **UNHCR had granted him mandate refugee status for a 12-month period**, the Lebanese authorities extradited him. During a stopover in Paris, he took the opportunity to reapply for political asylum in Spain and was transferred to that country to have his application examined. **In October 2000, his mandate refugee status was declared invalid by UNHCR and the Spanish authorities rejected his application for asylum**. The Ecuadorian authorities then requested the Spanish Government to continue the extradition proceedings. While the *Audencia Nacional* had approved that request, the applicant successfully applied to the Spanish

authorities for an interim order to stay the proceedings. He also made an application to the Court, based on **Article 3** of the ECHR and asked for the application of **Rule 39**. The Court granted the interim measure and asked the Spanish Government not to extradite the applicant. Following the examination of the guarantees obtained by Spain from Ecuador, **the Court lifted the interim measure**.[7]

3. Committee of Ministers

The Committee of Ministers examined the following cases during its June 2001 session:

♦ ***Ciliz v. The Netherlands*, Judgement of 11 July 2000, Appl. No. 29192/95**

The case concerned the Netherlands authorities' refusal to extend the applicant's residence permit in violation of his right to family life (violation of **Article 8**). The applicant had been expelled to Turkey, although proceedings concerning his right of access in respect of his son were (and remain) pending. The Committee of Ministers was informed that after he had been allowed to come back to the Netherlands he had been **issued with a residence permit, with no working restriction**.

♦ ***Jabari v. Turkey*, Judgement of 11 July 2000, Appl. No. 40035/98**

This case concerned a decision to deport the applicant to Iran, where she was at risk of being stoned to death, this being the penalty prescribed by Iranian law as punishment for adultery. The Turkish Permanent Representative confirmed to the Committee of Ministers that the applicant had been **granted a residence permit in Turkey**. It was also announced that the **five-day period within which asylum request had to be lodged** had been **increased to ten days** and that there was now a **possibility of introducing an appeal before the Council of State**. At the meeting, the Council of Europe Secretariat indicated that it needed details on the appeal procedure mentioned by the Turkish Representative in order to verify its independence and the guarantees it offered. It also wished to know what standards were used to evaluate whether or not a person should be expelled and how obligations under **Article 3** of the ECHR were taken into consideration.

♦ ***Loizidou v. Turkey*, Judgement of 18 December 1996, Appl. No. 15318/89**

In this Judgement, the Court had awarded the applicant just satisfaction on account of a violation of her right to the peaceful enjoyment of certain properties located in the northern part of Cyprus (**violation of Article 1 of Protocol No. 1** to the ECHR). The Court specified that payment was to take place before 28 October 1998. As Turkey did not pay the just satisfaction awarded, the Chairman of the Committee of Ministers wrote to his Turkish counterpart expressing the Committee's concern regarding the failure to execute the Judgement. When payment was still not made, the Committee adopted, on 6 October 1999, **Interim Resolution DH(99)680**, strongly urging Turkey

[7] For Decision of 16 April 2002 declaring the case inadmissible, see case law update for January–June 2002 in part 5.3 of this Manual.

to review its position and to pay the just satisfaction awarded. As payment still remained outstanding, the Chairman of the Committee wrote a new letter on 4 April 2000 to his Turkish counterpart reiterating the Committee's expectation that Turkey would ensure payment in the near future. The reply of the Turkish Minister of Foreign Affairs indicated that **Turkey did not consider itself to have either the competence or the jurisdiction to execute the Court's Judgement.** On 12 July 2000, the Committee of Ministers, in response, adopted a new **Interim Resolution DH(2000)105**, declaring that Turkey's refusal to execute the Judgement of the Court demonstrated a manifest disregard for its international obligations, both as a High Contracting Party to the ECHR and as a member State of the Council of Europe and insisting strongly, in view of the gravity of the matter, that Turkey comply fully and without any further delay with the Court's Judgement of 28 July 1998 ordering Turkey to pay to the applicant the specified damages, costs and expenses before 28 October 1998. In its latest **Interim Resolution DH2001(80)**, the Committee of Ministers resolved to ensure, with all means available to the organisation, Turkey's compliance with its obligations under this Judgement and called upon the authorities of the member States to take such action as they deemed appropriate to this end.

4. Other news

Mr Paul Mahoney was appointed registrar of the Court in place of Mr Michele de Salvia.

The following judges were newly elected or re-elected during the April and June 2001 sessions of the Parliamentary Assembly:

Mr Kristaq Traja	Albania
Mr Josep Casedevall Medrano	Andorra
Mrs Elisabeth Steiner	Austria
Mrs Snezhana Botusharova-Doicheva	Bulgaria
Mr Loukis Loucaides	Cyprus
Mr Peer Lorenzen	Denmark
Mrs Margarita Caca-Nikolovska	Former Yugoslav Republic of Macedonia
Mr Andras Baka	Hungary
Mr Vladimiro Zagrebelsky	Italy
Mr Egils Levits	Latvia
Mr Marc Fischbach	Luxembourg
Mr Stanislav Pavlovschi	Moldova
Mr Corneliu Birsan	Romania
Mrs Antonella Mularoni	San Marino
Mr Bostjan Zupancic	Slovenia
Mr Luzius Wildhaber (President)	Switzerland
Mr Antonio Pastor Ridruejo	Spain
Mr Riza Turmen	Turkey
Mr Volodymyr Butkevych	Ukraine

Turkey became the 27th State to sign **Protocol No. 12 (Anti-Discrimination Protocol)** to the ECHR on 18 April 2001.[8] The Protocol required 10 ratifications to enter into force, although Georgia is thus far the only State to have ratified Protocol No. 12.

UNHCR
2 August 2001[9]

[8] The signatories to Protocol No. 12 are Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Moldova, the Netherlands, Portugal, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, former Yugoslav Republic of Macedonia, Turkey and Ukraine.

[9] Footnotes updating progress of cases added March 2003.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.2 – Summaries of Judgements and Admissibility Decisions (July–December 2001)

1. Court Judgements

♦ ***Erdem v. Germany*, Judgement of 5 July 2001, Appl. No. 38321/97**

The applicant, a Turkish national of Kurdish origin, was a **recognised refugee** in France. In April 1988, he was arrested at the German border on suspicion of belonging to a terrorist organisation and using false documents. The same month, he was placed in provisional detention in Germany (which continued until 1994) in the context of investigations into his alleged involvement in the Kurdish Workers' Party (PKK) and a number of murders and abductions. In March 1994, the *Oberlandesgericht* (regional high court) in Düsseldorf sentenced him to six years' imprisonment for membership of a terrorist organisation. The court determined that he had been one of the founders of the PKK, had established PKK units in Lebanon and had been responsible for recruiting new members.

Before the Court, the applicant complained that the **length of his pre-trial detention** was excessive and **violated Article 5(3) (right to liberty and security of person) and Article 6(2) (right to a fair trial)** of the ECHR. He also complained that German law authorised the **surveillance of his correspondence with his lawyer** and alleged a **violation of Article 8 (right to respect for private and family life)** of the ECHR. Successive German courts justified the applicant's continued detention because of the complexity and seriousness of the case, the danger he would abscond, the numerous other persons accused in the case, and the defence strategy of the applicant's lawyer.

The Court noted that holding someone in pre-trial detention for five years could only be justified by the protection of public interest. After reviewing the arguments of the German Government, the Court considered that neither the complexity of the case, nor the alleged risk of absconding could justify such a long period of detention. Moreover, the Court noted that the domestic courts seized with the numerous release requests used standardised argumentation to refuse it, without looking at whether there were new elements. The Court concluded that there was a **violation of Article 5(3)** of the ECHR and it did not consider necessary to examine the issue of violation of Article 6(2). Concerning the surveillance of the applicant's correspondence, the Court confirmed that this constituted an interference with the applicant's rights under Article 8 which was, however, in accordance with a law pursuing a legitimate aim. Examining the necessity of such a measure, the Court noted that in German law **surveillance of correspondence was foreseen only in terrorism cases and with regard to specific individuals**. Moreover, the surveillance was limited to written correspondence and was carried out by an independent judge not involved in the

investigations. For all these reasons, the Court concluded that there was **no violation of Article 8** of the ECHR.

- ***Al-Adsani v. United Kingdom*, Judgement of 21 November 2001, Appl. No. 35763/97**

This case involved a **British/Kuwaiti national** who left Kuwait for the United Kingdom, after he was allegedly tortured by the Kuwaiti authorities. In the United Kingdom, the applicant initiated civil proceedings against Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who was related to the Emir of Kuwait and was said to have an influential position in Kuwait, and the Government of Kuwait seeking compensation for the injury caused by the acts of torture. He obtained a default judgement against the Sheikh but, on the basis of the 1978 State Immunity Act, the action against the Government of Kuwait was struck out.

Before the Court, the applicant argued that by denying him the possibility of initiating civil proceedings against the Government of Kuwait, **the United Kingdom had violated the provisions of Article 3** (prohibition of torture) **and Article 6** (particularly access to court) of the ECHR.

On the first part of the claim, the Court considered that States' obligations under Article 3 of the ECHR included an obligation to investigate acts of torture, inhuman or degrading treatment or punishment committed within their jurisdiction and an obligation not to return a person to a country where they would face such treatment. In the present case, however, the alleged acts of torture did not occur in the United Kingdom and the UK authorities had no causal link with their occurrence. Moreover, the applicant was not in danger of being sent back to Kuwait, since he was also a British national. Consequently, the Court considered that there was **no violation of Article 3** of the ECHR. Concerning the possibility of bringing a claim to court, the Court first considered that Article 6(1) was applicable in the present case, since the principle of State immunity is a procedural mechanism preventing an applicant from pursuing proceedings before domestic courts. On the merits, however, the Court declared that **despite the fact that the prohibition of torture is now considered to be a peremptory norm of international law (*jus cogens*), it could not find any rule of international law allowing for the waiver of State immunity in civil claims.** Consequently, it decided that here was **no violation of Article 6(1)** of the ECHR.

In their concurring opinions, Judge Pellonpaa (Finland) and Judge Bratza (UK) argued that finding a violation of Article 6(1) in this case could have had the consequence of seeing recognised refugees suing their country of origin for compensation before the domestic courts of countries of asylum. An immediate side effect would have been the adoption of an even more restrictive approach to refugees and asylum. Formulating a more legal argument, two other dissenting judges found that the Court did not draw all the consequences from the peremptory nature of the prohibition of torture. In their view, if the prohibition of torture is a rule of *jus cogens*, lower rules of international law, such as the principle of State immunity, should be ignored.

♦ ***Boultif v. Switzerland*, Judgement of 2 August 2001, Appl. No. 54273/00**

The applicant, an **Algerian national**, entered Switzerland with a tourist visa in 1992. He **married a Swiss national** in 1993. In 1994, he was sentenced to two years' imprisonment for **unlawful possession of weapons, robbery and damage to property**. Subsequently, the Swiss authorities refused to renew his residence permit and he was **ordered to leave the territory** after serving his prison sentence. He fled to Italy, where he had since been living illegally. The various remedies taken by him against the non-renewal decision were unsuccessful.

The applicant lodged a complaint before the Court, arguing that the non-renewal of his residence permit constituted a breach of **Article 8** of the ECHR since it prevented him from enjoying his right to family life. The applicant claimed that his wife could not be expected to follow him and settle in Algeria both because of the integration problems she would encounter and because of the fundamentalist threats against foreigners living in Algeria. The Swiss Government maintained that, in light of the serious criminal offences committed by the applicant, the interference with his family life was justified under the provisions of Article 8(2) and its decision not to renew the residence permit therefore fell within the limits of its margin of appreciation.

The Court examined whether the measure was "necessary in a democratic society" by taking into consideration the nature of the offence, the length of stay in the country of residence, the family situation and the difficulties which the spouse would encounter in the applicant's country of origin. The Court considered that the applicant behaved correctly during and after his time in prison. He undertook some professional training and was about to obtain regular employment. Moreover, the Court determined that since the applicant's wife had never lived in Algeria and had no ties with that country, she could not be expected to follow him there. Also, since it was not established that the applicant and his wife could obtain residence permits in Italy, the Court decided that the refusal to renew the residence permit constituted an interference with his family life. The Court concluded therefore that **there had been a violation of Article 8** of the ECHR.

♦ ***Sen v. The Netherlands*, Judgement of 21 December 2001, Appl. No. 31465/96**

The first applicant, **a Turkish national**, settled legally in the Netherlands at the age of 12. He obtained a residence permit and got married in 1982. His Turkish wife joined him in the Netherlands in 1986, after giving birth to a daughter in Turkey, these two persons being the second and third applicants. The child was left in the care of relatives in Turkey. In 1990 and in 1994, the applicant and his wife had two other children in the Netherlands. In the meantime, the applicant requested in 1992 a residence permit for their daughter who remained in Turkey. This was refused. The Netherlands authorities considered that such a decision was in conformity with the government's immigration policy and took account of the fact that the child could be taken care of by relatives in Turkey. It was also considered that the link between the family in the Netherlands and the child in Turkey was broken and that the parents did not contribute to her education or financial support.

The complaint before the Court was based on **Article 8** of the ECHR. The Netherlands Government recognised that "family life" existed between the child and her parents, but considered *inter alia* that the family was not prevented from reuniting in the country of origin. Moreover, the respondent Government held that it had no positive obligations in this case, since the child's care and education had not so far depended on her parents.

Focusing on the "returnability test", the Court considered that there were serious obstacles to the family's return to Turkey. Two of the children in the family had been born and lived in the Netherlands and, except for their nationality, had no other links with their country of origin. They went to school in the Netherlands and were raised in Dutch society. Under these circumstances, the Court considered that only reunification in the Netherlands was possible. **The Court concluded that there was a violation of Article 8.**

2. Court Decisions

A. Cases declared admissible

♦ ***Jakupovic v. Austria*, Decision of 15 November 2001, Appl. No. 36757/97**

The applicant, Elvis Jakupovic, **a national of Bosnia-Herzegovina** who was born in 1979, arrived in Austria in 1991, joining his mother who already lived and worked there. In January 1994, the police filed a criminal complaint against the applicant on suspicion of burglary. In May 1995, the District Administrative Authority issued an order banning him from possessing arms after he had attacked several persons with an electroshock device. In August 1995, the Regional Court convicted him of burglary and sentenced him to five months' imprisonment, suspended for a probationary period of three years. In September 1995, the District Administrative Authority issued a 10-year residence prohibition against him on the basis of the aforementioned events and in particular the applicant's conviction. In February 1996, the Regional Court convicted him once more of burglary and sentenced him to a further term of imprisonment of ten weeks, suspended for a probationary period of three years. The applicant's successive appeals against this decision were unsuccessful, the Austrian authorities finding that, in spite of the fact that his mother, brother and two half-sisters lived in Austria, the residence prohibition was necessary in the public interest in view of his criminal behaviour. He was deported to Sarajevo, Bosnia and Herzegovina, in April 1997.

The complaint before the Court was based on **Article 8** of the ECHR. The applicant argued that the residence prohibition is a disproportionate measure since the offences he committed were merely **minor acts of juvenile delinquency**. He also claimed that he had developed **strong ties with Austria**, where most of his family and his girlfriend lived. Moreover, he was **no longer in contact with his father** who was reported missing after the conflict in Bosnia and Herzegovina. The Austrian Government considered that the residence prohibition was a legitimate measure, in

accordance with the provisions of Article 8(2) of the ECHR. The Court declared the case **admissible under Article 8** of the ECHR.[1]

B. Cases declared inadmissible

♦ ***Bankovic, Stojadinovic, Stoimenovski, Joksimovic, Sukovic v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom*, Decision of 19 December 2001, Appl. No. 52207/99**

All five applicants were **nationals of the Federal Republic of Yugoslavia** and were the direct or indirect victims of the April 1999 strikes by forces of the North Atlantic Treaty Organisation (NATO) on the headquarters of *Radio Televizije Srbije* (RTS) in Belgrade. They claimed that the bombings constituted a violation of **Article 2 (right to life), Article 10 (freedom of expression) and Article 13 (right to an effective remedy)** of the ECHR.

Before examining the merits of the claim, the Court decided that it had to determine whether the applicants came under the purview of **Article 1** of the ECHR, that is, whether they were under the jurisdiction of the High Contracting Parties. The respondent governments argued *inter alia* that the applicants were not under their jurisdiction since they did not exercise any legal authority over them. According to them, it could not be considered that they were in control of the airspace over Belgrade or that they controlled the airspace in a manner comparable to territorial control. They considered the situation to be different from that in *Soering v. United Kingdom*,[2] where the United Kingdom had direct authority over an individual, and from that in *Loizidou v. Turkey*,[3] where Turkey had direct authority over a territory. The respondent governments also contended that holding them responsible for their collective international military activities would have serious consequences for their future participation in such international missions and would distort the purpose of the ECHR.

For its part, the Court recalled that the jurisdictional competence of a State is primarily territorial. Extra-territorial jurisdiction is not excluded but is limited by the sovereign territorial rights of other States. For the Court, while it did exceptionally consider that acts performed or producing effects outside a State party's territory can constitute an exercise of jurisdiction, Article 1 of the ECHR nonetheless reflects an

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[1] The Court handed down its Judgement in this case on 6 February 2003 and found a violation of Article 8. The Judgement concluded:

> [V]ery weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there. (para. 29)

The Court found that the Austrian Government had in this case "overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty" (para. 32).

[2] Judgement of 7 July 1989, Appl. No. 14038/88.

[3] Judgement of 28 November 1996, Appl. No. 15318/89.

essentially territorial conception of jurisdiction. In the present case, the Court did not consider that the acts of the respondent governments had the effect of bringing the victims of the strikes under their jurisdiction. For the Court, no positive obligations can be identified to provide protection under the specific circumstances of this case. The Court concluded that there was no jurisdictional link between the victims of the strikes and the respondent States. **The case was therefore declared inadmissible**.

C. Cases adjourned

♦ ***Momčilović v. Croatia*, Decision of 27 September 2001, Appl. No. 59138/00**

The applicant, Jovan Momčilović, claimed to be a Croatian citizen, who lived in Split, Dalmatia, until 1991, when he and his wife went to visit their daughter in Tuzla (in the former Socialist Republic of Bosnia and Herzegovina – at the time part of the Socialist Federal Republic of Yugoslavia). During the visit, the armed conflict in the region escalated, preventing him and his wife from returning to Split and causing them to flee to Belgrade. In 1996, the Split municipal court terminated the applicant's specially protected tenancy on the apartment in which he had lived in Split. In 1999, the applicant filed an application to return to Croatia, pursuant to the "Procedure for the Individual Return of the Persons who Left Croatia" with the Croatian Embassy in Belgrade. As the applicant had left the territory of present day Croatia shortly before its independence, he had never been issued with identity documents. No decision on his application to return had been taken at that stage.

Before the Court, the applicant claimed that the termination of his tenancy right violated **Article 8** and **Article 1 of Protocol No. 1** to the ECHR. In addition, he claimed that the procedure contravened **Article 6** of the ECHR, since he was not able to participate in it. He further argued that the failure of the Croatian authorities to issue him with entry documents in accordance with the "Procedure for the Individual Return of the Persons who Left Croatia" violated **Article 3(2) of Protocol No. 4** to the ECHR (right to enter territory of one's nationality). Concerning the termination of tenancy rights, the Court considered that since the domestic proceedings ended in 1996, prior to the entry into force of the ECHR in respect of Croatia, this part of the claim was outside its competence *ratione temporis*. As to the issue of return to Croatia, the Court decided to request the views of the Croatian Government and the examination of this part of the claim was therefore **adjourned**.[4]

[4] The Court eventually found the case inadmissible on 29 August 2002, when it noted that in the meantime the applicant had been able to enter Croatia, although he had no Croatian documents; that once in Croatia he had obtained Croatian identity documents, including a passport without any further delay. In these circumstances, the Court considered he could not claim that his right to enter the territory of his own country had been violated.

D. Cases struck off the list

♦ ***Kalantari v. Germany*, Judgement of 11 October 2001, Appl. No. 51342/99**

The applicant, Ali Reza Kalantari, was an **Iranian national** who left his country of origin because of his involvement in the opposition to the regime. He sought **asylum** in Germany in October 1997 on the grounds that he feared persecution because of his activities for an opposition movement in Iran. He also said that one of his sisters had been tortured to death by the Iranian authorities for her political activities, while another had been imprisoned and had since disappeared. In August 1998, his application was rejected and the decision was later confirmed by an administrative court and by the Administrative Court of Appeal of Bavaria. The applicant presented a new asylum claim in March 1999, arguing that he had taken part in a demonstration in front of the Iranian Embassy in Bonn during which he had been interviewed by a local television station. This new asylum application was once again rejected in the first instance and at appeal. The German authorities considered that the applicant had not convincingly demonstrated that his political activities in Germany would put him at risk in his country of origin and they consequently ordered his expulsion from Germany. The fact that he had signed a petition, later published in a Iranian newspaper and that he had spoken on a television channel received in Iran were not considered sufficient to establish the existence of a risk of persecution.

In September 1999, the applicant lodged a complaint before the Court based on **Article 3** of the ECHR. While the case was pending before the Court, the **German Federal Refugee Office ultimately found that there were obstacles to the applicant's return** to his country of origin and that, in accordance with domestic law (Article 53(4) of the Aliens Act), **he should not be returned**. The case was consequently struck off the Court's list.

E. Friendly settlements

♦ ***Duyonov and Others v. United Kingdom*, Judgement of 2 October 2001, Appl. No. 36670/97**

The applicants, four **Georgian nationals**, arrived illegally in **Gibraltar** in November 1995, thinking they were being put ashore in Canada where they intended to seek asylum. They presented themselves to the immigration authorities. The Governor of Gibraltar issued an order for their removal and their detention pending deportation. Their request to be released was approved in the first instance but was rejected on appeal by the authorities. As part of moves to appeal to the Privy Council, they requested legal aid, but this was refused since legal aid was not foreseen in such circumstances and the Chief Justice found that such a procedure did not conform to the provisions of the ECHR. On 5 March 2001, the Gibraltar House of Assembly passed a law providing for legal aid to be granted for appeals to the Privy Council. In mid-2001, the parties informed the Court that they had reached a friendly settlement involving the payment of a sum of money to the applicants (£5,000 sterling in total) and the Court struck the case off its list.

♦ ***K.K.C. v. The Netherlands*, Judgement of 21 December 2001, Appl. No. 58964/00**

The applicant, a **Russian national of Chechen origin**, claimed that in October 1994, when serving in the so-called "Chechen army", he was arrested, detained and accused of treason for having refused to carry out an order to open fire on Chechen opposition forces. He said that when opposition forces attacked Grozny, the Chechen capital, in November 1994, he escaped from detention and hid in Chechnya until he was able to flee to the Netherlands in 1997 when he claimed asylum or alternatively humanitarian status. His application was rejected throughout the procedure. The domestic courts in the Netherlands found that it was not unlikely that the applicant had held a function in the "Chechen army" when Chechnya declared itself independent from Russia and that it could not be excluded *prima facie* that he had reasons to fear the Chechens for having refused to execute an official order. They nevertheless found that he did not have to return to Chechnya but could settle anywhere else in the Russian Federation. It was also held that, although persons of Chechen origin might experience discrimination in the Russian Federation, it was not established that the applicant's life would be untenable.

The claim before the Court was based on **Article 3** of the ECHR. In this case, the Court allowed UNHCR to submit its written observations, which focussed on the legal and practical situation of Chechens in the Russian Federation. The Russian Government also submitted observations. When the Netherlands authorities granted the **applicant a residence permit without restrictions**, however, the parties reached a friendly settlement and the Court struck the case off its list.

F. Applications communicated to governments

♦ ***Balogh v. Hungary*, Appl. No. 47940/99**

The applicant, a Hungarian national of **Roma origin**, was arrested on suspicion of theft. He was allegedly mistreated by police officers. His eardrum was perforated. All domestic proceedings were unsuccessful due to lack of evidence. The application to the Court was communicated to the Hungarian Government on the basis **of Article 3** of the ECHR.

♦ ***Napijalo v. Croatia*, Appl. No. 66485/01**

In February 1999, **the applicant's passport was confiscated by the Croatian customs authorities** upon his return from Bosnia and Herzegovina. Thereafter his passport remained in the hands of the authorities, although no proceedings were instituted against him. In March 1999, the applicant filed a civil action against the Ministry of Finance in the relevant municipal court. The proceedings were still pending. In April 1999, he lodged an application with the county court claiming that his freedom of movement was being breached and requesting that the Ministry of Finance be ordered to return his passport. In September 1999, his application was turned down and he was advised to start civil proceedings before a municipal court

against the Ministry of Finance to recover his passport. The application before the Court was communicated to the Croatian Government on the basis of **Article 6(1) (applicability, length of proceedings)** of the ECHR and **Article 2 of Protocol No. 4** to the ECHR **(freedom of movement)**.

G. Rule 39 of the Rules of the Court – Interim measures

Nothing to report.

3. Committee of Ministers

♦ ***Hilal v. United Kingdom*, Judgement of 6 March 2001, Appl. No. 45276/99**

The UK authorities reported that they had issued the applicant with an **indefinite residence permit**.

4. Other news

The Council of Europe is currently negotiating the adoption of **Protocol No. 13 on the abolition of the death penalty in all circumstances**. The draft text of the protocol is now before the Committee of Ministers for discussion by the Permanent Representatives of the member States. If adopted by the Committee of Ministers, it will enter into force after ten ratifications have been secured and amend for the States concerned the provisions of Article 2(1) of the ECHR (right to life).[5]

UNHCR
17 January 2002[6]

[5] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances (ETS 187) was opened for signature on 3 May 2002.
[6] Footnotes updating progress of cases added March 2003.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.3 – Summaries of Judgements and Admissibility Decisions (January– June 2002)

1. Court Judgements

♦ ***Čonka v. Belgium*, Judgement of 5 February 2002, Appl. No. 51564/99**

The applicants were **four rejected Roma asylum-seekers from Slovakia**, who said that they had fled their country of origin because of harassment by skinheads and because the police refused to intervene to protect them. They **sought asylum in Belgium** in November 1998, where their requests were rejected both at the first instance (March 1999) and at the second (June 1999) for lack of credibility. The action before the *Conseil d'Etat* did not succeed either. In September 1999, the applicants received letters calling them and other Roma asylum-seekers from Slovakia to the police station in Ghent in order "to enable the files concerning their applications for asylum to be completed" their asylum requests. Upon arrival at the police station, they were served with an expulsion order, placed in detention, and expelled to Slovakia few days later.

Before the Court, the applicants argued that they had been "deceived about the purpose of their attendance at the police station" and that there had been an abuse of power which **violated Article 5(1)** of the ECHR **(lawfulness of detention).** They also alleged that the conditions of detention violated **Article 5(2) (information as to the reasons of detention)** and **Article 5(4) (judicial review)**. They further claimed that their expulsion and that of other Slovak nationals of Roma origin was a **collective expulsion prohibited by Article 4 of Protocol No. 4** to the ECHR, against which they had **no effective remedy** as required by **(Article 13)** of the ECHR.

The Court determined that "misleading [the asylum-seekers] about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5". It stated that while such methods could be justified for the prevention of criminal activities, they were not acceptable in cases involving asylum-seekers, even if they were residing illegally in the country. There was therefore a **violation of Article 5(1)** of the ECHR inasmuch as the action was taken to secure the detention of the asylum-seekers. On Article 5(4), the Court examined in detail the detention conditions in order to determine whether the applicants were able to have the decision to detain them reviewed. The Court noted that the **information concerning remedies** was **written in small letters and in a language that they could not understand**. Moreover, there was only one interpreter available at the police station and none when they were moved to the airport. Finally, the applicants' lawyer was informed of the detention only four days before the expulsion and he could not have pleaded their case because the competent jurisdiction held it next session after the departure date.

The Court concluded that there was a **violation of Article 5(4)**, but not of Article 5(2).

On Article 4 of Protocol No. 4, the Court recalled its jurisprudence finding that **there is collective expulsion when there is no individual and objective examination of each person's situation**. In the present case, the Court considered that while the applicants' situation had been individually examined during the asylum procedure, the September 1999 decisions to detain and expel them were taken without reference to their personal situation and only on the basis of their irregular stay in Belgium. **Noting that all the other expellees were called to the police station for the same reason, the Court concluded that this constituted collective expulsion and hence a violation of Article 4 of Protocol No. 4**. In dissenting opinions, three judges nevertheless found that the Belgian police had in fact examined the individual situation of those who were called, since they released a number of them for humanitarian and administrative reasons. They also argued that the September 1999 decisions to detain and expel could not be considered in isolation from the previous asylum procedure, which required an analysis of the applicants' claims. Lastly, on Article 13 in conjunction with Article 4 of Protocol No. 4, the Court concluded that there was indeed **no effective remedy available** to prevent the violation of the ECHR, **since the procedure before the *Conseil d'Etat* did not have suspensive effect even in emergency cases**.[1]

♦ ***Kutić v. Croatia*, Judgement of 1 March 2002, Appl. No. 48778/99**

The applicants, Mr and Ms Kutić, were both Croatian nationals, who initiated two domestic proceedings against the Republic of Croatia, following the **destruction of their house** and other property by explosives. The properties, located in Martinec and in Bjelovar, were destroyed in December 1991 and in November 1994 respectively. In January 1996, the Croatian Parliament amended the Civil Obligations Act to provide for all proceedings concerning actions for damages resulting form terrorist acts to be stayed pending the enactment of new legislation. The domestic judicial proceedings initiated by the applicants were therefore suspended and no new legislation had yet been introduced. Before the Court, the applicants claimed that they were deprived of their right of access to court and that the domestic proceedings exceeded the "reasonable time" requirement of **Article 6(1)** of the ECHR.

On the first issue, the Court recalled that **the right of access to a court included the right to institute proceedings, the right to have a final judgement implemented and the right to obtain a determination on a dispute by a court**. In the present case, the domestic proceedings had been suspended for over six years and no new legislation had been enacted. The Court concluded that given the long period of time involved, there was a **violation of Article 6(1)**. Concerning the length of proceedings, the Court decided that, given its findings on the first point, it did not need to examine this part of the claim separately.

[1] There was unanimity among the sitting judges concerning the violations of Article 5(1), Article 5(2), Article 5(4) but the violations of Article 4 of Protocol No. 4 and of Article 13 in conjunction with Article 4 of Protocol No. 4 were decided by four votes to three.

♦ ***Podkolzina v. Latvia*, Judgement of 9 April 2002, Appl. No. 46726/99**

The applicant, a **Russian-speaking national of Latvia**, was a candidate for the October 1998 general election in Latvia. She registered with the Electoral Commission, providing the required documentation including a language certificate showing that she spoke the official language, Latvian. In August 1998, a government inspector came unannounced to the applicant's work place to test her orally on her language abilities. The government inspector came again the next day and required her to take a written test, which she did not complete. As a result, the inspector reported that her command of Latvian was not sufficient and she was consequently barred from standing for the elections. When she was unsuccessful in reversing this decision before the domestic courts, the applicant lodged a complaint before the Court alleging a violation of of **Article 3 of Protocol No. 1** to the ECHR **(right to free elections)**, in conjunction with **Article 14 (discrimination)** and **Article 13 (effective remedy)** of the ECHR.

The Court recalled that Article 3 of Protocol No. 1 implied a **right to vote** and a **right to be candidate**, but that there are implicit limitations to these rights and States have a margin of appreciation in determining who can vote and who can be candidate. In this respect, the Court considered that the requirement that election candidates speak the official language adequately was a legitimate one. The procedure whereby such a requirement is enforced should, however, guarantee that **decisions are taken by an impartial body in a non-arbitrary, equitable and objective manner**. In the present case, the Court noted that the applicant submitted a language certificate obtained in accordance with the applicable law when registering for the elections. Of 21 candidates required to submit a language certificate, only nine, including the applicant, were subjected to additional tests. Moreover, the legal basis for such additional tests was not clear and in any case the decision was left to the discretion of one governmental inspector. The Court concluded that the procedure was not in accordance with the abovementioned guarantees. Consequently, the applicant's removal from the list of candidates was not proportionate to the legitimate aimed pursed by the government and was therefore a **violation of Article 3 of Protocol No. 1**. Concerning the alleged violations of Article 13 and Article 14, the Court considered that, given its findings on Article 3 of Protocol No. 1, it did not need to examine those parts of the claim.

♦ ***Al-Nashif and Others v. Bulgaria*, Judgement of 20 June 2002, Appl. No. 50963/99**

The first applicant, Daruish Al-Nashif, was a **stateless person of Palestinian origin** who resided legally in Bulgaria with his wife and two children, who were born in Bulgaria and had Bulgarian nationality (the two children being the second and third applicants). In April 1999, the Bulgarian authorities **revoked the first applicant's permanent residence permit for national security reasons**, on the ground that he was teaching Islam without permission. In June 1999, further decisions were taken to detain and to deport him; all these decisions were served on the applicant without an

explanation as to their reasons. The applicant appealed against the order revoking his residence permit but according to Bulgarian law decisions adopted in cases involving national security issues were not subject to judicial review. The decision to detain him was considered lawful, while the domestic courts made no determination concerning the legality of the deportation order. The applicant was deported to Syria in July 1999.[2]

Before the Court, the applicant complained that since Bulgarian law did not provide for judicial review against his detention, there was a violation of **Article 5(4)** of the ECHR. He also argued that he had no effective remedy **(Article 13)** against the decision to deport him, that it constituted an interference with his right to family life **(Article 8)**, and did not have a legal basis under **Article 8(2)**.

On the issue of detention without judicial review, the Court found that **a detained person should have access to a court and** should have **the opportunity to be heard in person or with some form of representation, even in cases of involving national security or terrorism**. It ruled that States invoking such grounds for detention must find a way to accommodate their legitimate security concerns and the guarantees of the ECHR. In the present case, the Court concluded that there was a **violation of** the ECHR insofar as the applicant did not enjoy the elementary safeguards of **Article 5(4)**.

Turning to the part of the claim based on Article 8, the Court first confirmed that "family life" existed between the applicants and that the deportation measure constituted an interference with this family life. At to whether the interference was in accordance with the law, the Court noted that while the deportation order had a legal basis, **the relevant domestic law lacked the necessary accessibility and predictability**. Indeed, the decision to deport was taken without disclosing any reasons to the applicant and there was no adversarial procedure or appeal possible to an independent body. In light of this, the Court decided that the legal deportation regime did not provide the necessary safeguards against arbitrariness and there was consequently a **violation of Article 8(2)** of the ECHR. The Court also noted that instead of trying to balance its security interests and the requirement to guarantee an effective domestic remedy, Bulgaria had removed such a remedy altogether for cases raising national security issues. For the Court, this also constituted in the present case a **violation of Article 13** of the ECHR.

2. Court Decisions

A. Cases declared admissible

♦ ***Sejdovic and Sulejmanovic v. Italy*, Decision of 14 March 2002, Appl. No. 57575/00**

[2] His wife left Bulgaria with the two children in June 2000, as she was unable to support her family alone.

The applicants, Fatima Sejdovic et Izet Sulejmanovic, were **nationals of Bosnia and Herzegovina of Roma origin**. They left their country of origin at an unspecified date and went to Italy. They settled in a camp (*Casilino 700*) in Rome and stayed there illegally until their expulsion in 2000. In 1995, the Italian authorities conducted a census of the camp and decided to provide better accommodation for those legally present, expel those who were not, and close the camp. When the closure operation began in 1999, it was discovered that even more illegal immigrants were living there than thought. As far as the applicants were concerned, one of them had received an expulsion order in November 1996 and the other in August 1999, although an appeal had only been made against the 1999 order. They were eventually expelled to Bosnia and Herzegovina in March 2000, along with other persons who lived in the camp.

Before the Court the applicants claimed *inter alia* that (1) their expulsion constituted a violation of **Article 3** of the ECHR in view of the treatment inflicted on persons of Roma origin in Bosnia and Herzegovina; (2) the manner in which the Italian authorities conducted the expulsion was also a violation of Article 3; (3) the living conditions in the camp in Rome amounted to inhuman and degrading treatment; (4) the expulsion was a **collective expulsion prohibited by Article 4 of Protocol No. 4**; (5) their expulsion was an interference with their family life because one of the applicants' parents and sister remained in Italy **(Article 8)**, and (6) they did not have an effective remedy against the expulsion orders **(Article 13)**.

After examining the arguments of the parties, including a report from UNHCR Sarajevo concerning the occupation of Roma houses by Bosnian Serb internally displaced persons, the Court declared the application **admissible on the basis of Article 3** with regard to their situation in Bosnia and Herzegovina. The parts of the claim based on **Article 4 of Protocol No. 4** (collective expulsion) **and Article 13** (effective remedy against the expulsion order) were also **declared admissible**. The rest of the claim was declared inadmissible.[3]

- ***Sulejmanovic and Sultanovic v. Italy*, Decision of 14 March 2002, Appl. No. 57574/00**

The facts of this case are similar to those of the preceding case. The applicants**, nationals of Bosnia and Herzegovina of Roma origin**, were expelled from Italy in March 2000. Their claim before the Court was based on the **same grounds and arguments**.

The Court declared the case **admissible** with regard to (1) **Article 3**, as it relates to their treatment in Bosnia and Herzegovina; (2) **Article 4 of Protocol No. 4** (collective expulsion) since the applicants were expelled along with a number of other individuals; and (3) **Article 13** with regard to the eventual absence of effective remedy against the expulsion orders. The notable difference to the preceding case was that the **applicants had a four-year-old child who suffered from Down's syndrome**, who had been receiving treatment in Italy following a heart operation in

[3] For friendly settlement and Judgement of 8 November 2002, see Part 5.4 of this Manual, update on relevant case law of the Court for July–December 2002.

1997. The applicants claimed that her expulsion, insofar as it stopped the treatment, constituted inhuman and degrading treatment in view of the consequences for the physical and psychological health of the child. The Court also declared this part of the claim **admissible on the basis of Article 3** of the ECHR.[4]

♦ ***Shevanova v. Latvia*, Decision of 28 February 2002, Appl. No. 58822/00**

The applicant, Nina Shevanova, was a **Russian-speaking** woman who **settled in Latvia in 1970** for professional reasons. She had a son in 1973. In 1991, following the break-up of the Soviet Union, she became stateless and was **registered in Latvia in 1992 as a non-citizen permanent resident**. In 1994, she was offered a job as a crane operator in Dagestan and Ingushetia in the Russian Federation. She was advised to obtain Russian citizenship and residence registration in the Russian Federation, which she did in order to secure her recruitment. She went to the Russian Federation to work in 1995 and in 1996. In 1998, the Latvian authorities discovered this situation and decided to cancel her residence registration. All domestic proceedings failed to reverse this decision and in February 2001 she was arrested and sent to the aliens' detention centre.

Before the Court, she claimed that sending her back to the Russian Federation would be a disproportionate sanction given the nature of the offence and the fact that she had been living in Latvia for 30 years and that she had no family links in the Russian Federation. The Court found that this case raised important issues of fact and law and that it should therefore be examined on the merits. The case was therefore declared **admissible** on the basis of **Article 8** of the ECHR.[5]

♦ ***Svetlana Sisojeva and Others v. Latvia*, Decision of 28 February 2002, Appl. No. 60654/00**

This case concerned the family of a **retired Soviet Union army soldier established in Latvia since 1968**. Of the four applicants, the wife (Svetlana Sisojeva) and eldest daughter were stateless and the husband and younger daughter were Russian nationals. After various domestic procedures, the District Tribunal of Aluksne, Latvia, where the family lived, decided to grant the applicants permanent residence status. This decision was quashed by the Supreme Court, however, since it was discovered that three of the applicants had obtained Russian citizenship and residence registration in the Russian Federation. The applicants were unsuccessful in reversing this Supreme Court decision, and so took their case to the Court, arguing that the **refusal to legalise their stay in Latvia constituted a violation of Article 8** of the ECHR (right to private and family life). The elder daughter, who had married a Latvian national, was authorised to apply for a non-citizen's permanent residence permit, but she refused to do so, claiming that she did not have one of the required documents.

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[4] For friendly settlement and Judgement of 8 November 2002, see Part 5.4 of this Manual, update on relevant case law of the Court for July–December 2002.
[5] As of March 2003, no Judgement had been handed down in this case.

For the elder daughter, the Court decided that insofar as she had refused to make use of a domestic remedy that might have solved her problem, her claim should be declared manifestly ill-founded. Concerning the remaining applicants, the Court found that their case raised important issues of fact and law and that they should therefore be examined on the merits. The case was therefore declared **admissible**.[6]

B. Cases declared inadmissible

♦ ***Larioshina v. Russian Federation*, Decision of 23 April 2002, Appl. No. 56869/00**

The applicant, a **Russian national receiving a pension** and other social benefits, complained before the Court that **her pension was insufficient**. She argued on the basis of **Article 1 of Protocol No. 1** to the ECHR that the pension did not allow her to maintain a proper standard of living. While the Court considered the claim manifestly ill-founded on this ground, it recalled that **in principle a complaint about a wholly insufficient pension may raise an issue under Article 3** of the ECHR. In the present case, there were not elements indicating that the applicant suffered inhuman or degrading treatment because of inadequate level of social benefits. The case was therefore declared **inadmissible**.

♦ ***Peñafiel Salgado v. Spain*, Decision of 16 April 2002, Appl. No. 65964/01**

The applicant, José Alejandro Peñafiel Salgado, was a banker in Ecuador. In August 1998, he moved to Spain, when the banks in Ecuador came under scrutiny for their role in the outbreak of a recession there. In 2000, Ecuador issued an extradition request against the applicant,[7] who applied for asylum in Spain, but was arrested in Lebanon while on a business trip. Although he had filed an application for asylum with the Spanish Embassy in Beirut and despite the fact that **UNHCR granted him mandate refugee status for a 12-month period**, the Lebanese authorities extradited him. During a stopover in Paris, he restated his application for political asylum in Spain and was transferred to that country so that his application could be examined. In October 2000, his **mandate refugee status was declared invalid by UNHCR and the Spanish authorities rejected his asylum request**. In February 2001, the Spanish *Audiencia Nacional* agreed to the extradition request and upon his return to Ecuador the applicant was placed in provisional detention.

Before the Court, the applicant complained that the extradition procedure, the asylum procedure in Spain and the procedures initiated against him in Ecuador violated **Article 6**. He also argued that in Ecuador he would be subjected to treatment contrary to **Articles 2 and 3** of the ECHR and that there was a violation of **Article 8** of the ECHR since he was married to a Spanish national residing in Spain.

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[6] As of March 2003, no Judgement had been handed down in this case.

[7] For interim measures earlier requested and granted under Rule 39 of the Rules of the Court, see Part 5.1 of this Manual, update on relevant case law of the Court for January–June 2001.

On the extradition and asylum procedures, the Court reiterated its jurisprudence according to which such procedures do not involve civil rights or criminal charges and cannot therefore be examined under Article 6 of the ECHR. **Concerning the procedures initiated against the applicant in Ecuador**, the Court noted it was not competent *ratione loci* to examine their compatibility with Article 6 of the ECHR and that Spain's responsibility could not be engaged for the activities of the Ecuadorian judicial authorities. With regard to the **risk of ill-treatment**, the Court concluded that, based on assurances received from the Ecuadorian authorities, that that part of the claim was manifestly ill-founded. Moreover, the Court recalled that should the applicant face human rights violations, he could resort to the Inter-American Court of Human Rights. Finally, the Court judged that since the applicant had married after he was extradited from Lebanon, it was his present detention in Ecuador and not Spain's decision to pursue the extradition procedure which was preventing him from having a family life. Therefore, that part of the claim was also declared manifestly ill-founded and the application was declared **inadmissible**.

♦ ***Milošević v. The Netherlands*, Decision of 19 March 2002, Appl. No. 77631/01**

The applicant, Slobodan Milošević the former president of the Federal Republic of Yugoslavia (FRY), was transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague in June 2001 and placed in detention there. He brought summary civil proceedings against the Netherlands before the Regional Court of The Hague, requesting that he be released. He argued *inter alia* that his transfer to ICTY was illegal under FRY law, that the ICTY lacked legal basis in international law, and that the ICTY was not impartial in the sense of Article 6 of the ECHR. The Regional Court found that ICTY did have sufficient legal basis; that it provided sufficient procedural guarantees and that, since the Netherlands had transferred its jurisdiction over ICTY's indictees to ICTY, the domestic courts were not competent to consider the applicant's release. Milošević lodged an appeal against this decision but later withdrew it.

Before the Court, the applicant considered that his detention in the Netherlands contravened **Article 5(1)** of the ECHR since it did not have a legal basis in domestic law and contravened **Article 5(2)** since additional charges were brought against him after his arrest. He also complained under **Article 6(1)** that the ICTY was not an "independent and impartial tribunal established by law", that it had been "illegally established" by the UN Security Council, and that the ICTY Prosecutor was "discriminatory" in that she prosecuted "mainly Serbs" and had failed to "bring prosecutions in connection with the military intervention by NATO member States on the territory of the FRY which took place in 1999". The applicant further claimed that ICTY's designation of *amici curiae* to defend his interests, since he had refused to appoint a lawyer, was a violation of **Article 6(3)** (right to defend oneself or to choose a defendant).

The Court considered that since the applicant withdrew his appeal against the August 2001 judgement of the Regional Court, **he had not exhausted domestic remedies**. The case was therefore declared **inadmissible.**

♦ ***Jovanović v. Croatia*, Decision of 28 February 2002, Appl. No. 59109/00**

The applicant, a Croatian citizen of Serbian national origin, was dismissed from his job at a state prison for young offenders in 1992 for allegedly having voted in a 1990 referendum for the formation of the so-called Serbian Autonomous Territory of Western Slavonia which sought to secede from Croatia. His dismissal letter stated that the holding of referendum amounted to a criminal offence contrary to the Croatian Constitution and that participation in it was incompatible with service in State organs. After all his domestic proceedings failed to secure a reversal of the decision, he applied to the Court on the basis of **Article 9** (freedom of thought, conscience and religion) and **Article 10** (freedom of expression) of the ECHR.

The Court recalled that upon accession to the ECHR, Croatia had recognised the Court's competence only for events occurring after 5 November 1997. Consequently, event though the last domestic judicial decision was dated October 1999, the dismissal as such was an act with immediate effect which took place before the entry into force of the ECHR in respect of Croatia. The application was therefore declared **inadmissible** as it fell outside the Court's competence *ratione temporis*.

C. Cases adjourned

Nothing to report.

D. Cases struck off the list

Nothing to report.

E. Friendly settlements

♦ ***Samy v. the Netherlands*, Judgement of 18 June 2002, Appl. No. 36499/97**

The applicant, a **national of Algeria**, was arrested in the Netherlands on suspicion of theft in August 1996. It appeared that he was staying illegally in the Netherlands and he was placed in an aliens' detention centre with a view to his expulsion. In March 1997, he was released since the authorities could not identify his country of origin. The Hague Regional Court found that his detention ceased to be lawful as of February 1997 and ordered the State to pay compensation to the applicant. The case, introduced before the Court in March 1997, was declared admissible on the basis of **Article 5(4)** in December 2001. In April 2002, however, the Government of the Netherlands informed the Court that it had **decided to pay additional compensation to the applicant**. In light of this friendly settlement of the dispute before the Court, the case was struck off the list.

F. Applications communicated to governments

♦ ***Shamsa and Shamsa v. Poland*, Decision of 10 January 2002, Appl. Nos. 45355/99 and 45357/99**

The applicants, Anwar and Abdel Salam Shamsa, were two brothers who were **Libyan nationals**. In the course of an identity check in Warsaw in May 1997, they were found to be without valid papers, and placed in detention pending expulsion. In the absence of a direct flight to Libya, three attempts to expel the applicants failed because they refused to continue their journey from three different transit countries. They were **detained by the Warsaw Airport immigration police upon return to Poland**. Their various legal actions against the detention were all unsuccessful. The District Prosecutor considered that those refused entry in the country and placed in a special area of the airport are not detained as such but are considered as having already been expelled from the country. The application to the Court was communicated to the Government under **Article 5(1)** of the ECHR.[8]

♦ **Kambangu v. Lithuania, Appl. No. 59619/00**

The applicant, a **national of Angola**, was arrested in March 1998 while trying to cross the border between Lithuania and Belarus. He said that his passport had been stolen and that he intended to go to the Embassy of Angola in Moscow to obtain a new one. He was arrested for not having a valid passport and kept in police custody before being transferred to the Aliens Registration Centre (ARC) on the ground that his presence in Lithuania was illegal. In June 1998, he **applied for asylum** and a temporary permit was delivered but he was ordered to remain at the ARC. In October 1998, his application for asylum was rejected and an expulsion order issued. He appealed against both decisions and the following month the Regional Court found in his favour in respect of the refusal to grant him asylum and the expulsion order was subsequently revoked. In June 1999, however, the authorities rejected his application for asylum and the applicant appealed against this decision and challenged his continued stay at the ARC. In October 1999, the Higher Administrative Court found that his stay in the ARC did not constitute detention and that it was compatible with domestic immigration legislation. The Court of Appeal rejected his appeal against the refusal to grant him asylum, but at further appeal the Higher Administrative Court found in December 1999 that the application for asylum had not been properly examined and quashed the decision refusing him asylum. In January 2000, he was allowed to leave the ARC after obtaining a new passport from the Angolan Embassy in Moscow. He did not bring any further proceedings regarding the legality of his stay in Lithuania and left the country at an unspecified date in 2000.

The application has been communicated to the Government under **Article 5(1) and 5(4), Article 13** and under **Article 2 of Protocol No. 4** to the ECHR **(freedom of movement)**.

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[8] For final Admissibility Decision of 5 December 2002, see Part 5.4 of this Manual, update on relevant case law of the Court for July–December 2002.

♦ **Bilasi-Ashiri v. Austria, Appl. No. 3314/02**

The applicant was an **Egyptian national**, who had been an active member of a succession of Islamic fundamentalist groups during the 1980s. By 1994, he was no longer politically active, but when Egyptian police began making mass arrests that year, he went into hiding and left the country. He arrived in Austria in 1995 and **claimed asylum**, but his application was dismissed, as was his appeal against the decision. The applicant pursued his claim through the courts until, in March 1998, the Administrative Court transferred the case to the newly-established Independent Asylum Panel, before which proceedings were still pending. In the meantime, criminal proceedings against the applicant in Egypt had resulted in his being sentenced *in absentia* in December 1995 to 15 years' imprisonment and hard labour, and in July 1998 the **Egyptian authorities requested his extradition**. This was eventually granted in November 2001 by the Vienna Court of Appeal on condition that the 1995 conviction be annulled, that he be retried before the ordinary courts, that his safety be respected, and that he not be extradited to a third country. In March 2002, UNHCR indicated to the Austrian authorities that it considered the applicant had a well-founded fear of persecution and should be granted refugee status. In August 2002, the Ministry of Justice stated that the Egyptian authorities had not accepted the conditions laid down in the extradition order. The applicant was released that same day. The case was communicated to the government on the basis of **Article 3** of the ECHR.[9]

G. Rule 39 of the Rules of the Court – Interim measures

Nothing to report.

3. Committee of Ministers

Nothing to report.

4. Other news

On 18 December 2001, the **United Kingdom** decided to invoke the provisions of **Article 15** of the ECHR (derogation in time of emergency). It made a Declaration, of which the relevant paragraph states:

> The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. … [T]here may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5(1)(f) as interpreted by the Court in the Chahal case. To the extent, therefore,

[9] For final Admissibility Decision of 26 November 2002, see Part 5.4 of this Manual, update on relevant case law of the Court for July–December 2002.

> that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

– On 29 January 2002, **Turkey** decided to withdraw the derogation it had made in 1992 under **Article 15** (derogation in time of emergency), concerning **Article 5** of the ECHR (right to liberty and security) with respect to provinces under the state of emergency.

– On 4 February 2002, the Secretary General of the Council of Europe invoked **Article 52** of the ECHR (Inquiries of the Secretary General) with regard to **Moldova**. In its request, the Secretary General asked the Government of Moldova to provide an explanation as to the manner by which domestic law ensured effective implementation of **all the provisions** of the ECHR.[10] In its reply dated 28 March 2002, the Government of Moldova recognised that part of its domestic legislation was not in compliance with the provisions of the ECHR. The response was unsatisfactory on key points, however, including notably Article 9 (freedom of thought), Article 10 (freedom of expression), and Article 11 (freedom of assembly and association) of the ECHR.

– On 15 April 2002, **Azerbaijan** ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as Protocol No. 6 (abolition of death penalty) with immediate entry into force. At the same time, Azerbaijan made the following declaration:

> The Republic of Azerbaijan declares that it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation.

– On 26 April 2002, **Armenia** handed to the Council of Europe Secretary General the instruments of ratification for the ECHR and Protocols Nos. 1, 4, and 7 to the ECHR. The first three instruments entered into force immediately, while Protocol No. 7 entered into force on 1 July 2002. Armenia did not formulate any reservation or declaration on these various texts.

– Protocol No. 12 (general anti-discrimination clause) was further signed by **Bosnia and Herzegovina** on 24 April 2002 and **Croatia** on 6 March 2002. It was also ratified by **Cyprus** on 30 April 2002. It needs 10 ratifications to enter into force.[11]

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[10] This request was triggered by the suspension of the activities of the Christian Democratic People's Party (CDPP) and the lifting of the parliamentary immunity of the leader and two other members of the CDPP.

[11] As of 15 March 2003, Protocol No. 12 had been signed by 30 member States, of which three had ratified the Protocol (Croatia, Cyprus, Georgia).

– **Protocol No. 13 (abolition of the death penalty in all circumstances)** was opened to signature on 3 May 2002. It has been signed by 33 member States and ratified by three so far.[12] It needs 10 ratifications to enter into force.

– On 7 June 2002 **Georgia** ratified **Protocol No. 1** to the ECHR, which guarantees among other rights the right to property. The Protocol entered into force immediately. Georgia formulated a number of reservations indicating *inter alia*:

> 1. Application of the article 1 of the Protocol does not extend over the persons, who according to the Law of Georgia on "Internally Displaced Persons" hold or will hold an IDP status, until the circumstances under which IDP status was granted cease to exist (regaining territorial integrity). According to the present law, State shall ensure implementation of property rights of IDPs on the places of their permanent residence, after alleviation of conditions enumerated in the paragraph 1 of the article 1.
>
> …
>
> 8. Georgia states that due to the situation in Abkhazia and Tskhinvali region, Georgia is deprived of possibility to be responsible over the respect and observance of the provisions set forth in the Present Convention and Protocols. Before regaining territorial jurisdiction in Abkhazia and Tskhinvali regions, Georgia will decline all responsibility over violations of the provisions set forth in the Protocol 1 by self-declared, illegal government authorities on these territories.

– **Malta** ratified **Protocol No. 4** to the ECHR on 5 June 2002.

– On 26 June 2002, the Parliamentary Assembly of the Council of Europe elected Mr Lech Garlicki as judge in respect of Poland.

UNHCR
15 July 2002[13]

[12] As of 15 March 2003, Protocol No. 13 had been signed by 39 member States, of which nine had ratified the Protocol (Bulgaria, Croatia, Cyprus, Denmark, Ireland, Liechtenstein, Malta, Switzerland, and Ukraine).
[13] Footnotes updating progress of cases and ratifications added March 2003.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.4 – Summaries of Judgements and Admissibility Decisions (July–December 2002)

1. Court Judgements

♦ ***Amrollahi v. Denmark*, Judgement of 11 July 2002, Appl. No. 56811/00**

The applicant, an **Iranian national**, arrived in Denmark in 1989 where he applied for **asylum**. He claimed that he had deserted the Iranian army during the Iran-Iraq war. Pursuant to the then policy of the Danish authorities whereby Iranian deserters were allowed to remain in Denmark, he was granted a residence permit, which became permanent in 1994. The applicant began living with a Danish national in 1992 and married her in 1997. They had two children, one in 1996 and the other in 2001. In 1996, the applicant was found guilty of drug trafficking and sentenced to three years' imprisonment, while an expulsion order was issued against him with a life-long ban on his return. Successive appeals against the expulsion decision failed, the Danish authorities considering that he did not have a well-founded fear of persecution in Iran.

Before the Court, the applicant claimed that his expulsion to Iran would constitute a violation of **Article 8 (right to family life)** of the ECHR, since his family could not be expected to follow him there. After considering that the life-long ban was indeed a measure interfering with the applicant's family life, and that the measure was in accordance with the law, the Court examined whether the interference was necessary in a democratic society, i.e. proportionate to the aim pursued. The Court listed the criteria it would take into account in making its assessment as follows: **the nature and seriousness of the offence committed; the length of stay of the applicant; the time elapsed since the offence was committed; the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; the existence of any children and their age; and the seriousness of the difficulties the spouse would be likely to face in the country of origin** (para. 35).

In this case, the Court considered that the offence committed by the applicant was indeed serious. It also found, however, that he had not really maintained strong links with his country of origin, having lost contact with his family in Iran in 1987, and that he had developed strong ties with Denmark as evidenced by the fact that he had a wife and two children born there. Moreover, his wife did not speak Farsi and had no ties with Iran, where she would therefore face difficulties. The Court also concluded that there was no indication that the family could settle in another country than Iran. Based on all these considerations, the Court found that the applicant's permanent exclusion from Denmark would have disproportionate consequences for his family life. The

Court concluded that the implementation of the expulsion order would constitute a **violation of Article 8** of the ECHR.

♦ ***Yildiz v. Austria*, Judgement of 31 October 2002, Appl. No. 37295/97**

The case concerned three applicants, the first of whom was a **Turkish national** who went to Austria in 1989 to live with his parents and siblings. He later married the second applicant, who had been born in Austria and had lived there all her life, and they had a daughter (the third applicant). In 1992–93, he was convicted of a series of minor offences and in September 1994 the Dornbirn District Authority imposed a five-year residence ban from the country on him. The applicant, invoking *inter alia* the **Association Agreement signed between the European Union and Turkey**, unsuccessfully appealed against this decision. In 1996, the Administrative Court considered that the applicant did not meet the criterion as to length of time worked in Austria that would have allowed him to benefit from the Association Agreement and confirmed the residence ban. He complied with the expulsion order in 1997, but lodged a complaint before the Court, claiming that his expulsion from Austria constituted a violation of his **right to family life under Article 8** of the ECHR.

The Court found that the residence ban constituted an interference in the applicants' private and family life and that the contested measure was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder and crime. The Court went on to analyse whether the measure was proportionate to the aim pursued and examined the family situation of the applicant, who had lived for nearly seven years in Austria. Even though his wife, with whom he had been living for three years, was a Turkish national, she had been born in Austria and had always lived there. Moreover, their daughter had been born in Austria in 1995. Concerning the offences committed by the first applicant, the Court found that, given the modest penalties imposed, they were of a minor nature. Taking all these elements unto account, the Court concluded that the measure was not proportionate and that there was therefore a **violation of Article 8** of the ECHR.

2. Court Decisions

A. Cases declared admissible

♦ ***Müslim v. Turkey*, Decision of 1 October 2002, Appl. No. 53566/99**

The applicant, Ahmad Hassan Müslim, an **Iraqi national of Turkmen origin**, fled to Turkey, which he entered legally in September 1998. He **applied for asylum to the UNHCR Office in Ankara and to the Turkish Ministry of Interior**. He claimed that he had fled Iraq following a dispute with the authorities over the expropriation of his grandfather's land. He also said that one of his brothers had reportedly been executed for desertion during the Gulf War in 1991, while another had been sentenced in 1994 to 15 years' imprisonment, allegedly for belonging to a dissident Turkmen group. UNHCR Ankara rejected his application in the first instance and at appeal because it considered that he was fleeing prosecution and not persecution. His

application with the Turkish authorities was also rejected in first instance but reversed at appeal. He was deemed a "temporary refugee" and was given a residence permit, renewable until the completion of his application with the Court or until he found a country, other than Iraq, willing to receive him.

Before the Court, the applicant claimed firstly that his eventual **expulsion to Iraq would violate Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment)** of the ECHR. Secondly, he claimed that the **Turkish asylum procedure was ineffective**, since in his case it merely consisted of filling out a form in Turkish, and a brief interview during which Ministry of Interior officials sought information on the route he had used to flee rather than on his reasons for leaving Iraq. He considered this procedure violated **Article 13 (right to an effective remedy)** of the ECHR. The Court declared the case **admissible on all grounds**.

♦ ***Thampibillai v. The Netherlands*, Decision of 9 July 2002, Appl. No. 61350/00**

The applicant, Tharmapalan Thampibillai, a **Sri Lankan national of Tamil origin**, arrived in the Netherlands in 1995 where he **applied for asylum**. He claimed that in 1991 he had been arrested and detained for two weeks by the Sri Lankan army which suspected him of being connected to the Liberation Tigers of Tamil Eelam (LTTE). After his release, he was asked to report regularly to the military and each time he was taken in for interrogation and beaten. He left Sri Lanka for Moscow in May 1994 with a false passport and arrived illegally in the Netherlands in January 1995. His asylum application was **rejected** in the first instance, as well as at appeal. The Netherlands authorities considered that the applicant did not establish that he was, or was known as, an opponent of the Sri Lankan Government. Moreover, they noted that he had been released in 1991 but only left in 1994. His subsequent request for humanitarian status was also rejected, all appeals against this decision failing because the Netherlands authorities viewed the security situation for rejected Tamil asylum-seekers in Colombo, the Sri Lankan capital, as not sufficiently serious for the applicant to have a real fear of treatment contrary to Article 3. Moreover, they relied on the opinion of **UNHCR**, expressed in a **letter of 22 June 2000**, according to which, the expulsion of rejected Tamil asylum-seekers was acceptable as long as they were in possession of identity documents issued by the Sri Lankan authorities.

The applicant lodged his complaint before the Court, arguing that his expulsion to Sri Lanka would constitute a violation of Article 3 of the ECHR. The Court reviewed the arguments of the parties and additional information including notably another **letter of April 2002 from UNHCR** to a solicitor in the United Kingdom calling for caution in relation to the return of failed asylum-seekers to Sri Lanka. The Court concluded that the case was **admissible under Article 3** of the ECHR.

- ***Venkadajalasarma v. The Netherlands*, Decision of 9 July 2002, Appl. No. 58510/00**

The applicant, Ramachandraiyer Venkadajalasarma, a **Sri Lankan of Tamil origin**, arrived in the Netherlands in 1995 where he **applied for asylum**. He claimed that he lived in Jaffna, in the north of Sri Lanka, where he owned a minibus which the LTTE confiscated to transport bombs. He was also forced to work for the LTTE and was once asked to report to their camp, where he thought he would be asked to fight with them. He decided to leave Jaffna for Colombo and went to an army camp to apply for a travel pass, which he ultimately received, although he was asked to return from Colombo within one week. Once in Colombo he decided to leave the country. His asylum application was **rejected** in the first instance and at appeal, the Netherlands authorities arguing that there was no evidence of problems with the LTTE or with the Sri Lankan Government since he had left his country of origin using his own passport. His subsequent request for humanitarian status was also rejected.

The applicant lodged a complaint before the Court arguing that his expulsion to Sri Lanka would constitute a violation of **Article 3** of the ECHR. The Court reviewed the arguments of the parties and additional information including notably a **letter of April 2002 from UNHCR** to a solicitor in the United Kingdom calling for caution in relation to the return of failed asylum-seekers to Sri Lanka. The Court concluded that the case was **admissible under Article 3** of the ECHR.

- ***Isayeva v. Russian Federation*, Decision of 19 December 2002, Appl. No. 57950/00**

The applicant, Zara Adamovna Isayeva, was a **Russian national and former resident of** Katyr-Yurt, **Chechnya**, who had since fled to Ingushetia. In February 2000, Russian military forces bombed Katyr-Yurt after Chechen fighters retreating from the Chechen capital Grozny entered the village. While she was fleeing with her relatives and other civilians, their convoy was attacked by Russian military aircraft. Her son and several other relatives including children died. In September 2000, a criminal case was opened by a local prosecutor's office of Katyr-Yurt. The investigation was closed in March 2002 since, according to the Russian authorities, "the use of the artillery and aviation was well-founded and ... harm and injuries to civilians were done as a consequences of absolute necessity". This decision had been challenged before the Rostov-on-Don Military court. Even though the latter procedure was still pending, the applicant lodged a complaint before the Court on the basis of **Article 2(1)** and, because of the absence of effective national remedies in Chechnya, on the basis of **Article 13** of the ECHR.

Before the Court, the Russian Government claimed that the case should be declared inadmissible for non-exhaustion of domestic remedies and that, although the courts in Chechnya indeed ceased to function in 1996, legal remedies were still available to those who left Chechnya. Residents were able to apply to the Supreme Court or to the courts in their new places of residence, while the applicant could have applied to the Office of the General Prosecutor of the Stavropol region. The applicant argued *inter*

alia that there were serious obstacles to the proper functioning of the system of administration of justice in Chechnya that cast serious doubt on the effectiveness of the prosecutors' work, as demonstrated by press and non-governmental organisation reports. In light of the above-mentioned arguments, the Court decided to join the preliminary objection to the merits and declared the case **admissible on all grounds**.

- ***Khashiyev and Akayeva v. Russian Federation*, Decision of 19 December 2002, Appl. Nos. 57942/00 and 57945/00**

The two applicants were **Russian nationals, formerly resident in Chechnya** and currently living in Ingushetia. Both left Grozny, Chechnya, at the end of 1999 because of the conflict, leaving some of their relatives behind to look after their property. In January 2000, they learned that their relatives had been killed and found their bodies in their houses, with gunshot wounds and marks of torture. A survivor of the killings told one of the applicants that the Russian army was responsible for these killings. Both applicants started legal proceedings in order to determine those responsible for the death of their relatives. With regard to the first applicant's action, the military prosecutor informed him in May 2000 that it had decided not to open an investigation against Russian soldiers. A criminal proceeding was nevertheless initiated by a prosecutor in Grozny in August 2000. An investigation was also opened into the second applicant's complaint. During the course of both investigations, the Russian authorities denied that federal soldiers could have been involved in the killings. According to the Russian authorities, the applicants' relatives could have been killed by Chechen fighters for refusing to join the rebel forces, or by robbers, or could even have themselves been rebels fighting the Russian army. In light of the difficulties of instituting proper investigations in Chechnya and securing appropriate redress for the killing of their relatives, the applicants lodged a complaint before the Court.

The application before the Court was based on **Article 2, Article 3 and Article 13 (effective remedy)**. After reviewing the arguments of the parties, notably the preliminary objection of the Russian Government as to the non-exhaustion of domestic remedies (see above-mentioned case of *Isayeva v. Russian Federation*), the Court decided to join this objection to the merits and declared the case **admissible on all grounds**.

- ***Isayeva, Yusupova and Bazayeva v. Russian Federation*, Decision of 19 December 2002, Appl. Nos. 57947/00, 57948/00 and 57949/00**

All three applicants were **Russian nationals, residents of Chechnya**. They left Grozny in October 1999, because of the military operations of the Russian forces in the city. They tried to go to Ingushetia but they were stopped at a military checkpoint, *Kavkaz-1*, on their way to Nazran, but were told to return to Grozny and that a humanitarian corridor into Ingushetia would only be opened later. On the way back to Grozny, the convoy was attacked by military aircraft and several of the applicants' relatives were either killed or wounded. The Russian authorities claimed that their planes had been attacked by rebels present in the convoy and they had therefore authorised the pilots to attack them. In May 2000, the military prosecutor of the

Northern Caucasus military circuit opened a criminal investigation, but this was closed in June 2002. The Government maintained that the pilots had followed due procedure in a situation where they had been attacked, had returned fire with permission, had not intended to kill civilians, and could not have foreseen their deaths. This decision was challenged before the Rostov-on-Don military court.

The complaints before the Court are based on **Article 2(1), Article 3 and**, in the absence of effective remedy in Chechnya, **Article 13** of the ECHR. One of the applicants also argued that the destruction of her car constituted a violation of **Article 1 of Protocol No. 1** to the ECHR. As a preliminary objection, the Russian Government said that the applicants had not exhausted domestic remedies. After considering arguments similar to those raised in the above-mentioned cases, the Court decided to join the preliminary objection to the merits and declared the case **admissible on all grounds**.

- ***Shamsa and Shamsa v. Poland*, Decision of 5 December 2002, Appl. Nos. 45355/99 and 45357/99**

The applicants, Anwar and Abdel Salam Shamsa, were two brothers who were **Libyan nationals**. The former had **applied for asylum** and was therefore legally staying in Poland. In spite of this, following an ID check in May 1997, In the course of an identity check in Warsaw in May 1997, they were found to be without valid papers, and the Warsaw District Prosecutor ordered their detention pending expulsion. In the absence of a direct flight to Libya, three attempts to expel the applicants failed because they refused to continue their journey from three different transit countries. They were **detained by the Warsaw Airport immigration police upon their return to Poland** in August 1997, but went on hunger strike and were taken to the hospital in October 1997, from which they managed to walk free. They lodged a complaint before domestic courts arguing that their detention in the Warsaw airport international transit zone between August and October 1997 was unlawful, but this action and successive appeals against their detention failed. The prosecutor for the district of Warsaw considered in June 1998 that the airport transit zone was not a place of detention pending expulsion because persons placed there were deemed already to have been expelled from the territory. Rather, the applicants were considered to have chosen freely to remain there by refusing to leave Polish territory for Libya. This decision was confirmed by the tribunal of the district of Warsaw in November 1998.

The applicants complained before the Court that their detention in Warsaw airport between August and October 1997 was illegal and violated **Article 5(1)** of the ECHR, and that an earlier period of detention between May and August 1997 violated **Article 5(3) and 5(4)** of the ECHR. The Court, after reviewing the elements of fact and law, found the application based on Article 5(3) and 5(4) inadmissible due to late submission but **admissible** on the basis of **Article 5(1)**.[1]

[1] For interim Admissibility Decision of 10 January 2002, see Part 5.3 of this Manual, update on relevant case law of the Court for January–June 2002.

B. Cases declared inadmissible

♦ ***Ammari v. Sweden*, Decision of 22 October 2002, Appl. No. 60959/00**

The applicant, Ramdane Ammari, **an Algerian national**, came to Sweden in May 2000. He **sought asylum** in June 2000 claiming that he feared persecution by the Armed Islamic Group (*Groupe Islamique Armé*—GIA) and by the Algerian authorities. He said that between 1996 and 1999 the GIA had forced him to work for them. They made him transport members of the group and deliver oil and gas to the GIA. In 1999, the police started to look for him as well, so he went to Algiers and from there to Germany, Poland and then Sweden. The National Migration Board rejected his application in August 2000 on the grounds that the claim lacked credibility. It found that the GIA had reportedly never been active in the applicant's home town (Tizi Ouzou), and that in any case he would benefit from immunity from prosecution under the Law on Civil Harmony. All successive domestic appeals failed.

The applicant introduced a claim before the Court on the basis of **Article 3** of the ECHR. Before the Court, the Swedish Government maintained that the applicant's claim was manifestly ill-founded since his submissions were vague and unsubstantiated. The Court recalled that given the absolute nature of Article 3, it

> may also apply where the danger emanates from persons or groups who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

The Court considered that the applicant had submitted no evidence showing that he would be subjected to a real risk of treatment contrary to Article 3 if returned to Algeria. Moreover, he was not a high-profile figure within the GIA and had not been involved in violent acts. Consequently, he could not be of much interest to the authorities or to the GIA. Based on these elements, the Court decided that there were not substantial grounds for believing that he would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR. Therefore, the case was declared **inadmissible**.

♦ ***Ostojić v. Croatia*, Decision of 26 September 2002, Appl. No. 16837/02**

The applicant, a **Croatian national of Serb origin**, lived in the village of Ostojići, Croatia. Following military actions by the Croatian army in August 1995, he fled to the Federal Republic of Yugoslavia, after which his property was allegedly destroyed. Before the Court, the applicant complained under **Article 6(1)** of the ECHR that he had been deprived of his right of access to the courts because legislative changes in 1996 and 1999 ordered that all proceedings concerning claims for compensation for damages caused by terrorist acts or by acts of members of the Croatian Army or police in connection with the war in Croatia be stayed. He complained under **Article 13** that he had no remedy at his disposal to be able to seek compensation for his destroyed property, because the Croatian authorities delayed his return to Croatia until March 2000, preventing him from launching civil domestic proceedings for compensation for the loss of his property. Finally, he complained under **Article 8**

(right to private and family life) of the ECHR and **Article 1 of Protocol No. 1**, taken alone and in conjunction with **Article 14 (discrimination)** of the ECHR. In this respect, he claimed that the destruction of his house violated his right to respect for his home and family life and his right to peaceful enjoyment of his property. He also claimed that the acts of violence were committed because of his Serbian origin

The Court declared that, while it had recognised that the 1996 legislative changes in Croatia violated Article 6 of the ECHR,[2] in the present case the applicant had not initiated domestic proceedings before the passing of the 1996 and 1999 legislation. Even though he had been unable to return to Croatia before March 2000, he could have filed a claim by letter or through a representative. Therefore **the parts of the claim based on Article 6(1) and Article 13** were declared **inadmissible**. Concerning the violations of Article 1 of Protocol No. 1 and Article 8 of the ECHR, the Court noted that the applicant's expulsion and the damage to his property occurred somewhere around 1995 and 1996, before the entry into force of the ECHR in respect of Croatia in November 1997. The **rest of the claim** was therefore declared **inadmissible *ratione temporis*.**

♦ ***Nogolica v. Croatia*, Decision of 5 September 2002, Appl. No. 77784/01**

The applicant, a **Croatian national**, filed two civil claims for libel against local newspapers. He lodged an application with the Court, based on **Article 6(1) and Article 13** of the ECHR, complaining about the **length of the civil proceedings** and **the lack of effective domestic remedies**. The Court recalled that in March 2002 Croatia enacted a new law providing that the Constitutional Court must examine all complaints related to excessive length of domestic civil and criminal proceedings. The new law gave the Constitutional Court the power to award compensation and to impose time limits on the domestic courts for deciding on such cases. In view of this, the Court considered that the applicant had not exhausted domestic remedies since he had not lodged a complaint with the Constitutional Court. It further decided that the Constitutional Court was an effective remedy, given the powers that it has been granted under the March 2002 legislation. Therefore, the case was declared **inadmissible on both grounds**.

C. Cases adjourned

Nothing to report.

[2] See *Kutić v. Croatia*, Judgement of 1 March 2002, Appl. No. 48778/99, in Part 5.3 of this Manual, update on relevant case law of the Court for January–June 2002.

D. Cases struck off the list

♦ ***Bilasi-Ashiri v. Austria*, Decision of 26 November 2002, Appl. No. 3314/02**

The applicant was an **Egyptian national**, who had been an active member of a succession of Islamic fundamentalist groups during the 1980s. By 1994, he was no longer politically active, but when Egyptian police began making mass arrests that year, he went into hiding and then left the country. He arrived in Austria in 1995 and **claimed asylum**, but his application was dismissed. He pursued his claim through the courts until, in March 1998, the Administrative Court transferred the case to the newly-established Independent Asylum Panel, before which proceedings were still pending. In the meantime, criminal proceedings against the applicant in Egypt had resulted in his being sentenced *in absentia* in December 1995 to 15 years' imprisonment and hard labour, and in July 1998 the **Egyptian authorities requested his extradition**. This was eventually granted in November 2001 by the Vienna Court of Appeal on condition that the 1995 conviction be annulled, that he be retried before the ordinary courts, that his safety be respected, and that he not be extradited to a third country. In March 2002, UNHCR indicated to the Austrian authorities that it considered the applicant had a well-founded fear of persecution and should be granted refugee status. In August 2002, the Ministry of Justice stated that the Egyptian authorities had not accepted the conditions laid down in the extradition order. The applicant was released that same day.

In light of these developments, the Court decided to strike the case off the list, considering that, even though the extradition order was still in force, there were no indications that the Austrian authorities would implement it unconditionally.[3]

E. Friendly settlements

♦ ***Sulejmanovic and Others and Sejdovic and Sulejmanovic v. Italy*, Judgement of 8 November 2002, Appl. Nos. 57574/00 and 57575/00**

The applicants, **nationals of Bosnia and Herzegovina of Roma origin**, left their country of origin at an unspecified date and went to Italy. They settled in a camp (*Casilino 700*) in Rome and stayed there illegally until their expulsion in 2000. In 1995, the Italian authorities conducted a census of the camp and decided to provide better accommodation for those legally present, expel those who were not, and close the camp. When the closure operation began in 1999, it was discovered that even more illegal immigrants were living there than thought. As far as the applicants were concerned, one of them had received an expulsion order in November 1996 and the other had received one in August 1999, although an appeal had only been made against the 1999 order. They were eventually expelled to Bosnia and Herzegovina in March 2000, along with other persons who lived in the camp.[4]

[3] For initial communication to Austria, see Part 5.3 of this Manual, update on relevant case law of the Court for January–July 2002.
[4] For Court Admissibility Decisions in these cases of 14 March 2002, see Part 5.3 of this Manual, update on relevant case law of the Court of January–June 2002.

After examining the arguments of the parties including a 2000 report from UNHCR Sarajevo, which mentioned their expulsion and reported on the occupation of Roma houses by Bosnian Serb internally displaced persons, the Court declared the application admissible on the basis of Article 3 with regard to their situation in Bosnia and Herzegovina. The Court also found the case admissible under Article 4 of Protocol No. 4 (collective expulsion) to the ECHR and Article 13 (effective remedy against the expulsion order) of the ECHR. In October 2002, the Italian Government informed the Court that it had reached a friendly settlement with the parties. This involved Italy **revoking the expulsion orders; readmitting those who had been expelled; granting the applicants humanitarian residence permits** (with a right to work and attend school); **finding temporary accommodation; ensuring medical care for the sick applicant; and affording substantial financial compensation to all the applicants**. The case was consequently struck off the Court's list.

F. Applications communicated to governments

♦ ***Abraham Lunguli v. Sweden*, Appl. No. 33692/02**

The applicant, a **national of Tanzania**, applied for **asylum** in Sweden in 2000 on the basis of a fear of being subjected to female genital mutilation. In 2001, her application was rejected on the basis that, since she was over the age of 15, she would no longer be exposed to the risk of genital mutilation in her country of origin. All successive appeals failed and she was ultimately placed in a detention centre pending expulsion. The case was communicated to the Swedish Government on the basis of **Article 3** of the ECHR.

♦ ***Shamayev and Twelve Others v. Georgia and Russian Federation*, Appl. No. 36378/02**

The applicants were **nationals of the Russian Federation of Chechen origin** who were detained in Georgia with a view to their **extradition to the Russian Federation** on the basis of a request from Russian authorities. The latter accused them *inter alia* of being involved in terrorist attacks in Moscow and elsewhere in Russia. They lodged a complaint before the Court on 4 October 2002 claiming that their extradition would expose them to violations of Article 2 and Article 3 of the ECHR. The complaint was communicated to both governments under **Article 2** and **Article 3** of the ECHR and additionally to the Georgian Government under **Article 5(1) 5(2) and 5(4) (detention)**. The Court also indicated interim measures had been instituted[5] and that the case had been given priority.

♦ ***Nasimi v. Sweden*, Appl. No. 38865/02**

The applicant was an **Iranian national of Kurdish origin**. In September 2000, he entered Sweden lawfully and **requested asylum**. He indicated that the authorities had discovered copies of a subversive journal in his house and had briefly detained and

[5] See below subsection G.

interrogated his wife and children. He had been an activist in a political organisation and had been imprisoned and tortured for this reason in 1990–92, while his brother and brother-in-law had been executed for their political activities. In May 2001, the applicant's family arrived in Sweden via Norway. The family's **asylum applications were rejected** in January 2002 by the Migration Board, which doubted whether the applicant really had been or would be persecuted by the Iranian authorities and the family's appeal was rejected on procedural grounds. A new application with further information and a medical report stating that the applicant was suffering from post-traumatic stress disorder was also rejected. A third application included expert testimony regarding the deteriorating mental state of the applicant and his daughter, who were said to be suicidal. In rejecting this application, the Appeals Board took the view that the family's mental state was not so serious that deportation would represent inhuman treatment. A fourth asylum application submitted in October 2002, including further expert medical testimony, was still pending.

The case was **communicated to the Swedish Government under Article 3** of the ECHR.

- ***N. v. Finland*, Appl. No. 38885/02**

The applicant, a **national of the Democratic Republic of Congo** (DRC, former Zaire), arrived in Finland in July 1998 and **requested asylum**. He stated that before the Mobutu regime in Zaire was overthrown in 1997, he was part of the *Division Spéciale Présidentielle* and was close to the Mobutu family, being of the same ethnic group and from the same region of origin. He infiltrated student groups in Zaire and later Zairean asylum-seekers in the Netherlands on behalf of the Mobutu regime. When the regime was overthrown, the applicant went to Angola, where he was detained and ill-treated. He eventually reached Finland via South Africa and the Netherlands. The **asylum application was rejected** in March 2001 on the grounds that he had not established his identity and had not shown that there was any real risk of treatment contrary to Article 3 of the ECHR if deported to the DRC. At appeal he gave a detailed account of his previous activities and his connection with the Mobutu regime, but the Administrative Court rejected his application, expressing doubt as to the seriousness of the risk of persecution as well as to the veracity of his story. The applicant appealed to the Supreme Administrative Court, which indicated to his lawyer that it would not suspend execution of the deportation order, due to take effect on 6 November 2002.

The case was **communicated to the Finish government under Article 3** of the ECHR.

G. Rule 39 of the Rules of the Court – Interim measures

♦ ***Shamayev and Twelve Others v. Georgia and Russian Federation*, Appl. No. 36378/02**[6]

On 4 October 2002, the Court received a preliminary application from 11 Chechens alleging that an extradition request from the Russian Federation to Georgia concerning them was about to be granted. In their view, such a measure, if implemented, would result in breaches of their rights under Articles 2 and 3 of the ECHR. They requested interim measures under Rule 39 and the Court decided on 4 October 2002 that these were indeed desirable and in the interests of the parties and the proper conduct of the proceedings not to extradite the applicants. The Court was later informed by the applicants' representatives that five of them had, however, already been extradited. In light of assurances from the Russian authorities that the applicants would have unhindered access to appropriate medical treatment and to legal advice and guarantees that they would not be sentenced to death if proven guilty, the Court nevertheless decided to **lift the interim measures** on 26 November 2002.

3. Supervision of execution of Judgements by the Committee of Ministers

♦ ***Kalantari v. Germany*, ResDH(2002)154 of 17 December 2002**

This case was struck off the Court's list in October 2001 following the decision of the German authorities not to send the applicant back to Iran.[7] In this Resolution, the Committee of Ministers expressed satisfaction that the German Government had paid the applicant DM 16,000 in respect of cost and expenses, as required in the Judgement.

♦ ***Cheema v. France*, ResDH(222)66 of 24 June 2002**

In this case, the Commission had found France guilty of violating **Article 8** of the ECHR because it refused to allow the applicant's wife to join him in France. The Committee of Ministers noted that the French Government had **paid the applicant just satisfaction** and **granted him and his wife a ten-year residence permit**.

♦ ***Ahmed v. Austria*, ResDH(2002)99 of 7 October 2002**

Following the 1996 Judgement[8] of the Court whereby Austria was found guilty of violating **Article 3** of the ECHR, the Committee of Ministers of the Council of Europe adopted a final follow-up resolution. It noted that the Austrian Parliament had on 9 July 2002 adopted a law amending the problematic provisions of the Aliens Act. This amendment provides that refusal of entry, expulsion or deportation are unlawful if they would lead to a violation of Article 2 and Article 3 of the ECHR or of Protocol

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[6] See above subsection F.

[7] For striking of case off the list, see Part 5.2 of this Manual, update on relevant case law of the Court for July–December 2001.

[8] *Ahmed v. Austria*, Judgement of 17 December 1996, Appl. No. 25964/94.

No. 6 on the abolition of the death penalty. In the Committee of Ministers' view, this would prevent future similar violations of the ECHR.

4. Other news

Nothing to report.

UNHCR
24 January 2003[9]

[9] Footnotes updating progress of cases added March 2003.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.5 – Summaries of Judgements and Admissibility Decisions (January–June 2003)

1. Court Judgements

♦ ***Lagerblom v. Sweden* (Appl. No. 26891/95, Judgement of 12 January 2003)**

The applicant is a **Finnish national** who settled in Sweden in the 1980s. In February 1993, he was charged with a criminal offence. He was convicted in May 1994. The sentence was confirmed in appeal in June 1995. During the whole procedure, the applicant, for whom a lawyer was appointed, spoke in Finnish and submitted documents in Finnish. He also wanted to be represented by a different lawyer, one who understood Finnish. Before the Court he complained on the basis of **Art. 6 § 3 of the ECHR**, that he was not allowed to be defended by a lawyer of his choice. As a consequence his appointed lawyer, who did not or understand speak Finnish, could not carry out his duties properly. The Court started by saying that **the right to chose one's lawyer was not absolute, notably when free legal aid is concerned**. In appointing lawyers domestic courts should have regard to the wishes of the accused but these can be overridden when necessary for the interests of justice. In this case, the Court noted that the applicant's command of Swedish was sufficient to communicate with his lawyer and that in any case interpretation was provided during the hearings and when submitting documents in Finnish. For all these reasons, the Court decided that there was **no breach of Art. 6 § 3 of the ECHR**.

♦ ***Mamatkulov & Abdurasulovic v. Turkey* (Appl. No. 46827/99 & 46951/99, Judgement of 6 February 2003)**

Both applicants are **nationals of Uzbekistan** who fled to Turkey in 1998-1999 because of their involvement in anti-governmental activities and crimes. Once in Turkey, they were arrested and detained with a view to being extradited to Uzbekistan. All the domestic remedies failed because the Turkish courts considered that the applicants' criminal activities in Uzbekistan were of a non-political nature. They applied to the Court in March 1999 claiming that their extradition would constitute a violation of *i)* **Art. 2** and **Art. 3,** since political opponents are seriously ill-treated in Uzbekistan, *ii)* **Art. 6,** because of the unfairness of both the Turkish extradition procedure and the criminal trial in Uzbekistan and, *iii)* **Art. 34 (right to individual application before the Court)**, insofar as their extradition, in violation of the interim measure, prevented them from properly presenting and defending their case before the Court. Indeed, on 18 March 1999, the Court indicated an interim measure whereby it requested Turkey not to extradite the applicants, pending the examination of their claim. However, the Turkish authorities disregarded the interim measure and extradited the applicants to Uzbekistan on 27 March 1999. With regard to the part of the claim based on Art. 3 of the ECHR, the Court considered that while

there were reports indicating that political opponents faced serious human rights violations in Uzbekistan, it was not demonstrated that the applicants themselves faced a real risk of being subjected to ill-treatment. Moreover, medical reports from the Uzbek medical authorities did not show that the applicants were mis-treated while in detention in Uzbekistan. Also, the Uzbek authorities had given assurances to Turkey that the applicants would not be sentenced to death and would be treated correctly. Based on these elements the Court concluded that **the risk of ill-treatment was not sufficiently established**. As for an eventual violation of Art. 6 by Turkey during the extradition procedure, the Court reiterated its jurisprudence on the inapplicability of that provision to extradition procedures,[1] which as such do not involve a civil right or a criminal charge. On the other aspect of the Art. 6 complaint, the Court found that it did not have enough evidence to determine whether or not the judicial proceedings in Uzbekistan where conducted in violation of Art. 6 of the ECHR. Therefore on both these grounds, the Court unanimously said that there was **no violation of the ECHR**. With regard to **Art. 34**, the Court noted that the applicant's extradition prevented them from communicating properly with their lawyers and from providing evidence of violations of Art. 3 of the ECHR. The Court considered that in the context of Art. 3 the non-respect of an interim measure could have irreparable consequences, thus rendering the protection of the ECHR ineffective. The Court then made reference to other international jurisdictions (International Court of Justice, Inter-American Court of Human Rights) and treaty bodies (UN Committee of Human Rights, UN Torture Committee) which decided in some recent decisions and judgements that interim measures were somehow binding insofar as their aim is to preserve the rights of the parties and prevent eventual violations of the concerned international obligations. Based on this developing jurisprudence, the Court noted that if the applicants were not able to provide sufficient evidence to establish eventual violations of Art. 3 of the ECHR, that was because Turkey extradited them to Uzbekistan, from where they could not communicate properly with the Turkish lawyer in charge of their case in Strasbourg. Consequently, six judges out of seven (the Turkish judge dissented on this point) **concluded that the disregard of the interim measure constituted an indirect violation of Art. 34 of the ECHR.** It must be noted that in accordance with Art. 43 of the ECHR, this judgement has been referred to the Grand Chamber. The Grand Chamber has the power to review a judgement when the case raises serious questions affecting the interpretation or application of the ECHR or a serious issue of general importance. Therefore, **this judgement is not final**.

♦ ***Jakupovic v. Austria* (Appl. No. 36757/97, Judgement of 6 February 2003)**

The applicant is a national of **Bosnia Herzegovina** who went to Austria in 1991 to join his mother who was already living and working there. Following several criminal offences (burglary, possession of arms) he was issued with **a 10 year residence prohibition** in 1995. This decision was confirmed in successive appeals and the applicant **was deported to Bosnia Herzegovina in 1997**. Before the Court, the applicant complained that the residence prohibition constituted an interference with his right to family life and consequently a violation of **Art. 8 § 1 of the ECHR**. The

1 See Judgement of the Court in the case of *Maaouia v. France*, 5 October 2000, Appl. No. 39652/98. Update No. 15, August 2000–December 2000.

Court indicated that its task in such cases was to determine whether a fair balance was struck between the States' interests (prevention of crime) and the applicant's rights. In this case, the Court noted that the applicant was 16 when he was expelled. Moreover, Bosnia had just been through a conflict and the applicant's father has been reported missing since the end of the conflict. There was no evidence that he still had relatives living there. Turning to the criminal offences, the Court considered that while the applicant was convicted twice for burglary, he was only given conditional sentences of imprisonment. Moreover, there were no indications that he made use of the arms for which he received a prohibition of possession. Based on all these elements, the Court decided the Austrian authorities did not strike a fair balance between the interests at stake. Consequently there was a **violation of Art. 8 of the ECHR**.

♦ ***Ocalan v. Turkey* (Appl. No. 46221/99, Judgement of 12 March 2003)**

On 9 October 1998, the applicant was **expelled from Syria**, where he was living for many years. He ultimately went to Kenya, from where, on the evening of 15 February 1999, he was taken on board of an aircraft at Nairobi airport and arrested by Turkish officials. He was then flown to Turkey. On arrival in Turkey he was questioned by the security forces from 16 to 23 February 1999. He received no legal assistance during that period and made several self-incriminating statements which contributed to his conviction. His lawyer in Turkey was prevented from travelling to visit him by members of the security forces. On 23 February 1999, the applicant appeared before an Ankara State Security Court judge, who ordered him to be placed in pre-trial detention. The first visit from his lawyers was restricted to 20 minutes and took place with members of the security forces and a judge present in the same room. Subsequent meetings took place in the same conditions. After the first two visits from his lawyers, the applicant’s contact with them was restricted to two one-hour visits a week. The prison authorities did not authorise the applicant’s lawyers to provide him with a copy of the documents in the case file, other than the indictment. It was not until the hearing on 2 June 1999 that the State Security Court gave the applicant permission to consult the case file under the supervision of two registrars and his lawyers permission to provide him with a copy of certain documents. He was indicted on 24 April 1999 for carrying out actions calculated to bring about the separation of a part of Turkish territory and of forming and leading an armed separatist group (Kurdistan Workers’ Party – PKK) to achieve that end. The Public Prosecutor asked the court to sentence the applicant to death. On 29 June 1999 the applicant was found guilty as charged and sentenced to death. The Court of Cassation upheld the judgement. On 30 November 1999 the European Court of Human Rights, applying Rule 39 of the Rules of Court (interim measures), requested the Turkish authorities not to carry out the sentence so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant’s complaints under the ECHR. In October 2001, Article 38 of the Turkish Constitution was amended, abolishing the death penalty except in time of war or of imminent threat of war or for acts of terrorism. On 3 October 2002, the Ankara State Security Court commuted the applicant’s death sentence to life imprisonment. The Court made the following finding with regard to the various aspects of the complaint;

Detention:

The Court held, unanimously, that there had been:

- **no violation of Article 5 § 1** (no unlawful deprivation of liberty) of the ECHR in that the applicant's arrest and detention had not been unlawful;
- **a violation of Article 5 § 3** (right to be brought promptly before a judge) given the failure to bring the applicant before a judge promptly after his arrest;
- **a violation of Article 5 § 4** (right to have lawfulness of detention decided speedily by a court) given the lack of a remedy by which the applicant could have the lawfulness of his detention in police custody decided.

Fair trial

The Court held:

- by six votes to one, that there had been **a violation of Article 6 § 1** in that the applicant was not tried by an independent and impartial tribunal;
- and unanimously that there had been **a violation of Article 6 § 1** (right to a fair trial), taken together with Article 6 § 3 (b) (right to adequate time and facilities for preparation of defence) and (c) (right to legal assistance), in that the applicant did not have a fair trial.

Death penalty

The Court held:

- unanimously, that there had been **no violation of Article 2** (right to life);
- unanimously, that there had been **no violation of Article 3** (prohibition of ill-treatment) of the ECHR, concerning the implementation of the death penalty;
- and, by six votes to one, that there had been **a violation of Article 3** concerning the imposition of the death penalty following an unfair trial.

Treatment and conditions

The Court held, unanimously, that there had been:

- **no violation of Article 3** of the Convention, concerning the conditions in which the applicant was transferred from Kenya to Turkey and the conditions of his detention on the island of İmralı.

Other complaints

The Court also held, unanimously, that there had been:

- **no violation of Article 14** of the Convention (prohibition of discrimination), taken together with Article 2 as regards the implementation of the death penalty;
- **no violation of Article 34** of the Convention (right of individual application).

Finally the Court held, unanimously, that no separate examination was necessary of the applicant's remaining complaints under Articles 7 (no punishment without law), 8

(right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 13 (right to an effective remedy), 14 and 18 (limitation on use of restrictions on rights).

♦ ***Yilmaz v. Germany* (Appl. No. 52853/99, Judgement of 17 April 2003)**

The applicant is a **Turkish national** who was **born in Germany** in 1976. In 1992, he was granted an **indefinite residence permit**. However, between 1995 and 1996 he committed a number of criminal offences (robbery, assault, sexual assault) for which he was sentenced to prison. In 1998, he was informed that in view of his criminal record he was **requested to leave Germany or face expulsion**. Even though the applicant had a German girlfriend, with whom he had a child, all the appeals against this administrative decision failed and the applicant had to leave Germany in 2000. Before the Court, the applicant claimed that his expulsion to Turkey and the indefinite ban from German territory constituted an **interference with his family life** and therefore a violation of **Art. 8 § 1 of the ECHR**. The Court first confirmed that the decision to expel the applicant was prescribed by law and pursued a legitimate aim, i.e. the prevention of disorder or crime. It then determined whether such a measure was proportionate and necessary in a democratic society. The Court noted that the applicant was a second generation immigrant. He studied in Germany, he had an indefinite residence permit and he had a German partner and a young child. Also, his parents and his two sisters live in Germany. With regard to this last point, **the Court recalled the protection of Art. 8 applies to adults if it is demonstrated that there is a dependency link, other than the usual affective bonds**. Finally, the Court found that the applicant was relatively young when he committed the criminal offences, for which he was sentenced to three years imprisonment in total. In light of all these elements, the Court concluded that while the expulsion of the applicant was not as such a disproportionate measure, the fact that the authorities decided to issue an indefinite ban from the territory, made it go beyond what is necessary in a democratic society. Therefore, the Court decided that there had been a **violation of Art. 8 of the ECHR**.

2. Court Decisions

A. Cases declared admissible

♦ ***Krstina Blecic v. Croatia* (Appl. No. 59532/00, Decision of 30 January 2003)**

The applicant is a **Croatian citizen** of **Serb descent**. In 1953, she and her husband were granted a **specially protected tenancy on a flat in the town of Zadar**. Following his death in 1989, she became the sole tenant. In July 1991, she travelled to visit her daughter in Rome. Shortly afterwards **armed conflict broke out in Dalmatia** and Zadar was subjected to heavy shelling. In October 1991, the Croatian authorities terminated the applicant's pension and medical insurance, as she was not, at that time, a Croatian citizen. In view of her age and poor health, the applicant decided to remain in Rome. In November 1991, a **family occupied the applicant's flat**. In February 1992, the municipal authorities took proceedings against the

applicant **to terminate her tenancy right** on the basis that she had been absent for more than six months without justification. The applicant relied on her lack of means and poor health as reasons for staying with her daughter. The Municipal Court found these reasons insufficient to justify her absence and terminated her tenancy. After successive appeals including to the Constitutional Court, the applicant's tenancy right was ultimately terminated. Before the Court the applicant claims that the judicial termination of her tenancy right constitutes a violation of **Art. 8 (right to respect for her home)** and **Art. 1 Protocol 1**, since she was deprived of a possibility to buy the flat under favourable conditions. The Court first looked at **whether it was competent *ratione temporis* to consider this complaint**, since the facts and part of the domestic proceedings took place before the entry into force of the ECHR in respect of Croatia (5 November 1997). To make that determination, the Court observed that the last domestic judicial decision, the Constitutional Court's decision of November 1999, was in fact directly decisive for the applicant’s Convention rights. Therefore, the Court considered the application compatible *ratione temporis*. The Court finally considered the **application admissible on both grounds**.

♦ ***Moldovan & 13 Others and Rostas & 9 Others v. Romania*** **(Appl. No. 41138/98 and Appl. No. 64320/01, Decision of 3 June 2003)**

Following a deadly bar fight involving two **Romas** from the village of Hădăreni in September 1993, the non-Roma population of the village decided to take revenge on all the Romas living there. As a result, some 13 houses belonging to Romas were burnt and other properties destroyed. The two Romas involved in the bar fight were beaten to death. The police did nothing to protect the applicants and even assisted the mob during the riot. While the criminal proceedings concerning the eventual involvement of police officers into these incidents were unsuccessful, those concerning the non-Roma villagers lead to the conviction of twelve of them. Some were convicted of extremely serious murder and others of destruction, offences against morality and disturbance of public order. The Court of Appeal and later the Supreme Court increased the prison sentence for some of them and decreased it for others. Those convicted of extremely serious murder were ultimately pardoned by Presidential decisions and released. The Romanian government also allocated some funds for the rehabilitation of the destroyed houses. Before the Court, the applicants claim that since the destruction of their houses they have been **living in very poor conditions**, amounting to inhuman and degrading treatment contrary to **Art. 3 of the ECHR**. They also complain under **Art. 6** about the length of criminal proceedings and about the fact that in the absence of proceedings against the police officers involved in the riots, it is impossible to determine to what extent the **civil responsibility of the State** could be established. They further claim under **Art. 8** that due to the **partial or superficial rehabilitation of their houses**, they cannot resume a normal family life. They invoke **Art. 14 (discrimination)** in conjunction with all the a/m articles. The Court declared the application **admissible on all grounds**.

B. Cases declared inadmissible

♦ ***Mogos and Krifka v. Germany*** **(Appl. No. 78084/01, Decision of 27 March 2003)**

The applicants, a couple and their five children, are **stateless persons of Romanian origin**.[2] In 1990, they left Romania for Germany where they sought **asylum** claiming that being **Romas** they faced persecution. In 1993, they **renounced their Romanian nationality**. Their application for asylum, as well as their attempts to obtain residence permits in Germany were rejected at all stages of the procedure. On 7 March 2002, the applicants (with the exception of the first two children, who were married to German nationals) were expelled to Romania, notably pursuant to an agreement concluded between the two States in 1998, whereby Romania declared that it was prepared to accept its former national who had become stateless persons. They have been staying since then in the transit centre of Bucharest Airport, refusing to enter Romania but wishing to return to Germany. Before the Court, the applicants complained that the implementation of the agreement signed between Germany and Romania violated **Art. 6 § 1 of the ECHR**. Moreover, their expulsion as such violated **Art. 3 and Art. 8 of the ECHR**. The Court declared the case **inadmissible for non-exhaustion of domestic remedies**, since the applicant's lawyer did not deem necessary to go before the Federal Constitutional Court. Indeed, in the opinion of the applicants' representative, this constitutional action had no prospect of success.

♦ ***Roslina Chandra and Others v. the Netherlands*** **(Appl. No. 53102/99, Decision of 13 May 2003)**

The principle applicant is a **Dutch national of Indonesian origin**. She left Indonesia in 1992 while she was still in the process of divorcing from her husband. The four children remained in Indonesia in their father's care. In the Netherlands, she met and settled with a Dutch national and she was granted a residence permit for the purpose of living with him. She obtained Dutch citizenship in 1996. In the meantime, she was **granted custody of the children** and she therefore wanted them to join her. They arrived in the Netherlands in 1997 with a short stay visa of 90 days. Their **request for a residence permit was rejected** by the Dutch authorities which considered that the close ties between the mother and her children were severed by the separation back in 1992 and that in any case she did not have the means to support them. Moreover, for the Dutch authorities, there were no obstacles to the family living together in Indonesia. The successive appeals against this decision were unsuccessful. Before the Court, the applicant claimed that the refusal to deliver a residence permit constituted an interference with the family life and therefore a violation of **Art. 8 of the ECHR**. The Court considered first that the children lived all their lives in Indonesia and had therefore strong links with that country. Moreover, two of them attained the age of majority and given the age of the others, 15 and 13 years old, they were not as much in need of care as younger children. The Court further found that the children could live in Indonesia with other relatives or even with their mother, who could develop a

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2 For the part of the complaint concerning Romania, see under Applications Communicated to Governments, *Mogos v. Romania*, Appl. No. 20420/02

family life in that country. For all these reasons, the Court concluded that by refusing the requested residence permit, the Netherlands did in fact strike a fair balance between the applicant's interests and its own interest in controlling immigration. The case was therefore declared **inadmissible**.

C. Cases adjourned

Nothing to report.

D. Cases struck off the list

Nothing to report.

E. Friendly settlements

Nothing to report.

F. Applications communicated to governments

♦ ***Mogos v. Romania* (Appl. No. 20420/02)**

The applicants, a couple and their five major children, are **stateless persons of Romanian origin**.[3] In 1990, they left Romania for Germany where they sought **asylum** claiming that being **Romas** they faced persecution. In 1993, they renounced their Romanian nationality. Their application for asylum, as well as their attempts to obtain residence permits in Germany were rejected at all stages of the procedure. On 7 March 2002, the applicants (with the exception of the first two children, who were married to German nationals) were expelled to Romania, notably pursuant to an agreement concluded between the two States in 1998, whereby Romania declared that it was prepared to accept its former national who had become stateless persons. Since 7 March 2002 the deported applicants, including the three children, have remained in the transit centre of Bucharest Airport, refusing to enter Romania but wishing to return to Germany. The case has been communicated to the Romanian government under **Art. 3 (ill-treatment), Art. 5 § 1 (detention), Art. 2 Protocol No. 4 (freedom of movement), and Art. 14 (discrimination) in conjunction with Art. 3 and Art. 2 of Protocol No. 4.**

♦ ***Basnet v. United Kingdom* (Appl. No. 43136/02)**

The applicant is a **national of Nepal**, who sought **asylum** in the UK in October 2000. She claimed that she suffered ill-treatment on account of her husband's political activities. He was arrested in April 2000 as was their son six weeks later. Neither had been seen since. Her **asylum application was rejected** on the basis that she was not facing persecution, her claims did not amount to a sustained pattern or campaign of persecution and she could have attempted to seek redress through the proper Nepalese

3 For the part of the complaint concerning Germany, see under Cases Declared Inadmissible, *Mogos and Krifka v. Germany*, Appl. No. 78084/01

authorities. There were also significant discrepancies in her account. The applicant appealed to the Special Adjudicator. Although she was legally represented, she prepared the written submissions herself. Her **appeal was rejected** on the ground that her account was unreliable, inconsistent and that there was no reasonable likelihood of her being targeted, detained, tortured, ill-treated or killed in Nepal. The applicant prepared written submissions for the Immigration Appeals Tribunal (IAT), repeating her claims and explaining that the inconsistencies noted by the Special Adjudicator were due to **poor translations**. While IAT hearing was scheduled for April 2001, the applicant submitted a medical certificate indicating her inability to attend on the appointed date. Her solicitors withdrew just before the hearing, which went ahead nonetheless. The **IAT decided to disregard the applicant's further documentary evidence** since it had not been filed in triplicate and the applicant had not explained why she had not made these arguments earlier. The IAT upheld the Special Adjudicator's decision. The applicant sought leave to appeal, arguing that her failure to supply documents in triplicate was due to her **lack of professional help**, as **she had not been able to pay her solicitors**. She further submitted that the inconsistencies detected in her statements were due to factors such as trauma-induced memory loss and **language difficulties**, since **the interpreters assigned to her were not proficient in her language**. Following the refusal of leave to appeal, the applicant applied to the Court of Appeal, which rejected her application in November 2002. The applicant's expulsion was scheduled for 10 December 2002 but on the basis of *Rule 39* the Court asked the UK not to carry it out. The case was then communicated to the Government under **Art. 2, Art. 3, Art. 5 and Art. 6 of the ECHR.**

♦ ***Ovihangy v. Sweden* (Appl. No. 44421/02)**

The applicant is an **Iranian national** of **Kurdish descent** who sought **asylum** in Sweden in April 1999. He claimed that he became a political activist in 1990 and that he was arrested, detained and tortured in 1994, after which he avoided political activity. However, in February 1999, following the arrest of Abdullah Öcalan, he participated in a public demonstration, handing out posters and leaflets. The military intervened and the applicant went into hiding. He learned of the arrest of his father and brother and secretly left the country for Turkey, from where he travelled to Sweden. His **asylum application was rejected** both in first and second instance. The Swedish asylum authorities considered that, apart from those who worked actively for Kurdish political goals, the members of this ethnic minority were normally left in peace. As the applicant ceased political activity in 1994, his fears were exaggerated. The applicant made two successive **new asylum applications**, producing a medical opinion showing a risk of suicide should he be deported and providing further information about the risks he would face in Iran and a medical diagnosis of post-traumatic stress disorder. They were again rejected. In October 2002, he was put on a plane to Istanbul, escorted by two police officers. However, attempts to make him board a plane to Teheran from Istanbul failed and he was therefore taken back to Sweden where he was kept in detention until 23 December. A further psychiatric assessment concluded that because of the long-lasting strains to which the applicant had been exposed (torture, political persecution), his mental health would be

significantly prejudiced should he be forcibly expelled and that there was a high risk of suicide. On 2 January 2003, the expulsion order was stayed. In addition to arguing that his expulsion would be contrary to Art. 3, the applicant contends that his detention was illegal, since it exceeded the period of two months permitted in Swedish law. The complaint has been communicated to the Government under **Art. 3 and Art. 5 § 1(f) of the ECHR**.

- ***Ndangoya v. Sweden* (Appl. No. 17868/03)**

The applicant is a **Tanzanian national** currently serving a seven-year sentence in Sweden for aggravated assault. He was married to a Swedish national, whom he accompanied to Sweden in 1991. Both spouses were already **infected with HIV**. They had two daughters in 1991 and 1996. The applicant received a residence permit in July 1996. He divorced his wife in 1997 and in 1999 he was convicted of aggravated assault. In addition to the term of imprisonment, the court of appeal **ordered that he should be banned for life from Sweden**. The applicant claims that he has a close relationship with his daughters and has produced letters in support of his claim. His place of detention is far from their home, creating psychological difficulties for his former spouse and his daughters. According to a medical expert, the applicant would have **little chance of continuing his treatment for HIV if sent back to Tanzania**. This would entail the development of Aids, leading to death in 3-4 years. The application was communicated to the government under **Art. 2, Art. 3 and Art. 8 of the ECHR**.

- ***Melnychenko v. Ukraine* (Appl. No. 17707/02)**

The applicant is a **Ukrainian national** holding **refugee status in the USA**. He was previously an officer in the State Security Service of Ukraine, assigned to the President's office. During the course of his work, he made audio recordings of phone calls between the President and other persons regarding the possible involvement of the President in the disappearance of a journalist. The applicant left the country two days before the tapes were made public in Parliament in November 2000. **He was granted refugee status by the USA in April 2001**. In January 2002, the Socialist Party of Ukraine nominated the applicant to stand for the upcoming parliamentary elections. However, his candidature was rejected on the basis that he was not permanently resident in the country and that he had provided inaccurate information about his actual place of residence and his residence during the previous five years. The applicant maintains that he still has a permanent address in Kiev. The complaint has been communicated to the Government under **Art. 3 of the Protocol No. 1 (right to free election)** and **Art. 14 (discrimination) of the ECHR**.

G. Rule 39 of the Rules of the Court – Interim measures

Nothing to report.

3. Supervision of execution of Judgements by the Committee of Ministers

♦ ***KKC v. the Netherlands*, ResDH(2003)38 adopted on 24 February 2003**

In this decision the Committee of Ministers satisfied itself that in accordance with the judgement of 21 December 2001[4] the Dutch government did issue to the applicant a residence permit without restrictions and paid to him the sum of 1,400 Euros in respect of costs and expenses.

4. Other news

On 15 January 2003, **Malta** signed and ratified **Protocol 7** of the ECHR.

On 29 January 2003, Francisco Javier Borrego Borrego **(Spain)** was elected as judge at the European Court of Human Rights.

In **March 2003**, four judges of the Court went to Moldova to take evidence from witnesses in the case of *Ilascu and Others v. Moldova and the Russian Federation*. Interviews with the witnesses took place in Chisinau and in Tiraspol. This case has been declared admissible on 4 July 2001 and is currently pending before a Grand Chamber of the Court.[5]

Protocol 12 of the ECHR (prohibition of discrimination) has been further ratified by Croatia and San Marino. Having also been ratified by Cyprus and Georgia, it needs another 6 ratifications in order to enter into force. It has been signed by 28 member states of the Council of Europe.

On 3 April 2003, **the State Union of Serbia and Montenegro** signed **the ECHR**, as well as **Protocol 1, 4, 6, 7, 12 and 13**.

Protocol 13 of the ECHR (abolition of the death penalty in times of war) **entered into force on 1 July 2003**. It has been signed and ratified by 15 member states of the Council of Europe.[6]

UNHCR
22 July 2003

4 See Update No. 17, July–December 2001.
5 See Update No. 16, January–July 2001.
6 Andorra, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Ireland, Liechtenstein, Malta, Romania, San Marino, Sweden, Switzerland, Ukraine.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.6 – Summaries of Judgements and Admissibility Decisions (July–December 2003)

1. Court Judgements

♦ ***Shamsa v. Poland*, Judgement of 27 November 2003, Appl. No. 45355/99 & 45357/99**

The applicants are **two Libyan nationals** who were **detained in the Warsaw international airport transit zone** after several failed expulsions. One of them, Anwar Shamsa, had applied for **asylum** and was therefore legally staying in Poland. In spite of this, and following an ID check in May 1997, the Polish authorities decided to expel both of them to their country of origin since they were not able to show residence permits. The Warsaw District Prosecutor ordered their detention on 28 May 1997 in view of their expulsion, which had to take place within 90 days. Between August and September 1997, they were detained by the border police at the Warsaw airport from where the Polish authorities tried to expel them to Libya at least three times. Each time they were returned to Poland, since they refused to carry on their journey once in the transit country. Upon their last return to Poland on 11 September 1997, they were declared undesirable on Polish territory and kept in detention by the border guards at the Warsaw airport. However, they went on hunger strike and were taken to the hospital in October 1997. They managed to walk out free from the hospital. They lodged a complaint before domestic courts arguing that their detention at the Warsaw airport international transit zone between August and October 1997 was unlawful since the 90 days delay to expel them had expired on 25 August 1997. This action, as well as the successive appeals failed, the arguments of the domestic courts being that the transit zone is not the Polish territory and that the applicants were kept there because they thwarted the various expulsion attempts. Since they did not have the proper entry and stay documents, they remained in the transit zone but were not detained *stricto sensu*. The applicants' complaint before the Court is therefore based on **Art. 5 para. 1** of the ECHR, since they consider that they were unlawfully deprived of their liberty. The Court started by determining whether the applicants were in a detention situation while in the transit zone. It looked at the nature, duration and modalities of the restriction of liberty to conclude that they were in fact in a detention situation, since they were **guarded by the border police** and **had no freedom of movement**. Looking at the legality of the detention from 25 August to 3 October 1997, the Court noted the applicants were **kept in the transit zone only on the basis of the internal rules of the border guards**. For the Court, these rules cannot be considered as a legal basis for a detention measure. The Court identified a legal vacuum in Polish legislation in that there are no specific laws concerning detention of aliens after the expiry of the deadline for their expulsion. It further indicated that a detention measure lasting for a number of days must be decided by a tribunal, a judge or a person with judicial powers. **The detention of the applicants in the transit zone beyond the deadline for their expulsion was therefore declared contrary to Art. 5 para. 1 of the ECHR**.

♦ ***Napijalo v. Croatia*, Judgement of 13 November 2003, Appl. No. 66485/01**

The applicant is a Croatian national whose **passport was confiscated** by a Croat custom officer in February 1999 because he could not pay a fine for failure to declare some goods at the border point between Bosnia Herzegovina and Croatia. However, despite his refusal to pay the fine, no proceedings were instituted against him. In March 1999, the applicant filed a civil suit against the Ministry of Finance, seeking the return of his passport and the payment of damages following his inability to leave Croatia. While his passport was returned to him in April 2001, the applicant maintained his case, seeking only the payment of damages. His claim was however dismissed both in first instance and in appeal. Before the Court, the applicant complained that in contradiction with **Art. 6 para. 1** of the ECHR the **civil proceedings lasted unreasonably long**. He also argued that the **confiscation of his passport** which prevented him from leaving Croatia **was a restriction of his freedom of movement protected by Art. 2 para. 2 of Protocol 4 of the ECHR**. On the first issue, the Court noted that the **domestic proceedings lasted more than three years** for a case which was not very complex. The applicant did not contribute to the length of the proceedings, while the judicial authorities took no action upon the case for at least 20 months. In light of this, and given the fact that the domestic proceedings involved a Convention right (freedom of movement), the Court concluded that Croat judicial authorities did not act with due diligence. Therefore, **there has been a violation of Art. 6 para. 1 of the ECHR**. On the second element, the Court considered that the confiscation of a document, such as a passport, is undoubtedly a measure that constitutes an interference with one's freedom of movement. It examined whether such a measure was in this case based in law and pursued a legitimate aim. While the Government argued that there was a basis in domestic law for the seizure of the passport, the Court only examined the issue of proportionality. It noted that no proceedings for customs offence were ever instituted against the applicant after he refused to pay the fine in February 1999. There were therefore no justifications for keeping his passport until April 2001 or for the domestic courts not to grant his demands before that date. Consequently, the Court concluded that the **confiscation measure was a breach of the applicant's freedom of movement** and constituted a **violation of Art. 2 para. 2 of Protocol 4**.

♦ ***Aćimović v. Croatia*, Judgement of 9 October 2003, Appl. No. 61237/00**

The applicant is a Croatian national whose **house was used for military needs by the Croatian Army from August 1992 to August 1995**. He found his house devastated and all his possessions were stolen. In March 1996, he instituted civil proceedings for damages against the Republic of Croatia. On 28 November 2000, **his case was stayed** following the 6 November 1999 legislation whereby all proceedings concerning actions for damages resulting from acts of the Croatian army and police during the war were to be stayed pending the adoption of a new legislation on this issue. **A new legislation was introduced in July 2003** only and in the meantime all his domestic appeals failed. Before the Court the applicant claimed that **in violation of Art. 6 para. 1 of the ECHR**, he was deprived of his right of access to Court. For the Government, the applicant was not deprived of his right to access to Court, since he was able to institute proceedings, which were suspended only temporarily. Moreover, the new law of July 2003 gives him now the possibility to pursue his case. For the Court, while States have the possibility to apply limitations to the right to access a domestic court, **such limitations should not undermine the essence of the right and be proportionate to the legitimate aim pursued**. In this case, the Court noted that the Croatian authorities had promised to enact a new law within 6 months of the November 1999 legislation staying liability proceedings against the Croatian Army. However, no law was adopted before July 2003. The applicant was left in a prolonged uncertainty and this constitutes, for the Court, a **violation of Art. 6 para. 1 of the ECHR**.

♦ ***Slivenko v. Latvia*, Judgement of 9 October 2003, Appl. No. 48321/99**[*]

After Latvia's independence in 1991, the applicant and her daughter who were residing in Latvia and held **Soviet Union citizenship**, were entered in the register of Latvian residents with the status of **'ex-USSR citizens'**. However, in 1994, the applicant's husband, an officer in the Russian army, retired from the military and applied for a residence permit. The Latvian authorities refused to issue him a residence permit, arguing that Russian military officers and their families were required to leave Latvia following the signing of the Treaty on withdrawal of the Russian Troops between Latvia and Russia in April 1994. The Latvian immigration authorities also cancelled the applicant and her daughter's residence registration and requested them to leave. The applicant's husband left Latvia in 1996, after unsuccessfully applying for a residence permit. Following the annulment of their registration as Latvian residents and unsuccessful appeals before Latvian courts, the applicant and her daughter left Latvia in July 1999. Before the Court, the applicant claimed that the decisions of the Latvia authorities violated their **right to private/family life and home protected by Art. 8 para. 1 of the ECHR**. The applicant considered that the provisions of the Treaty on Withdrawal of the Russian Troops were mis-interpreted. Moreover, she was well integrated in Latvia, having lived there since 1959, she spoke the language and worked in Latvian firms. Her parents are still living there and in addition to that her daughter was born in Latvia and attended secondary school in Latvia. The Court first ascertained whether the applicant had a family/private life in Latvia. It noted that she lived in Latvia since 1959, when her parents moved there, that she went to school, worked and married in Latvia. Her daughter was born there and went to school as well. For the Court, the applicant had therefore developed **a network of personal, social and economic relations** amounting to **private life** which has been interfered with by virtue of the decision of the Latvian authorities. The Court then considered that the measure was in accordance with the law, which in this case was the Treaty on Withdrawal of Troops, and pursued a legitimate aim, namely the protection on national security. Turning to the last leg of its reasoning, the Court considered that while the Treaty on Withdrawal of Troops was not as such in contravention with the ECHR**, in specific circumstances its implementation can be problematic from the point of view of the Convention**. In this case, the Court noted that the applicant's husband was a retired Russian army officer at the time of the signing of the Treaty. The family was **living outside of military barracks** and the **applicants worked in Latvian firms**, while her **daughter attended normal schools** and not military ones. Moreover, **they spoke Latvian** to a sufficient extent and **the applicants had developed personal, social and economic ties in Latvia**. For all these reasons, the Court found that the Latvian authorities had overstepped their margin of appreciation in requesting the applicants removal from Latvia and thus **violated Art. 8 para. 1 of the ECHR**.

♦ ***Kastelic v. Croatia*, Judgement of 10 July 2003, Appl. No. 60533/00**

In April 1992, the applicant's house and restaurant were destroyed by an explosion. In November 1994, he filed an action for compensation on the basis of the Civil Obligations Act. He was awarded compensation in first instance but the Government appealed that judgement. However, **the case was stayed in appeal following the January 1996 change to the Civil Obligations Act**, whereby all actions for compensation resulting from terrorist acts were to be stayed until the adoption of a new legislation. Before the Court, the applicant claimed, on the

[*] Note that this is a Grand Chamber judgement and that the violation on Art. 8 was decided by an 11 votes to 6. In their dissenting opinion, some of the judges emphasised that the applicants could have established their private life in the Russian Federation, since they originated from there, had an appartment in Kursk ans spoke the language.

basis of **Art. 6 para. 1 of the ECHR**, that as a result of the **retroactive legislation** he was **deprived of his right of access to a court** and that the **domestic proceedings exceeded a reasonable time**. The Court, in accordance with the Kutić jurisprudence[1], considered that since no new legislation concerning compensation for terrorist acts has been adopted, the applicant's **right to access to court protected by Art. 6 para. 1 of the ECHR has indeed been violated**. Concerning the length of proceedings, the Court did not find it necessary to look into this issue, given its finding on the right to access to Court.

2. Court Decisions

A. Cases declared admissible

♦ ***N. v. Finland*, Decision of 23 September 2003, Appl. No. 38885/02**

The applicant is a **national of the Democratic Republic of Congo (DRC)**, who sought **asylum** in Finland in July 1998. He left the DRC following the overthrow of Mobutu because he claims that he was a **member of the Division Spéciale Présidentielle (DSP)**. His asylum request was **rejected** in first instance because his submission was deemed inconsistent and he failed to prove his identity. The Directorate of Immigration ordered his deportation in March 2001. The first instance decision was confirmed by the Administrative Court in June 2002 and later by the Supreme Administrative Court despite the fact that the applicant was able to give details on the nature of his activities and about Mobutu's family. Before the Court, the applicant argues that his **return to the DRC would expose him to a risk of ill-treatment contrary to Art. 3 of the ECHR**. Moreover, since he has contracted a **common law marriage with a Russian national**, also seeking asylum in Finland, and with whom he has a child, he claims that his/their return, even to the Russian Federation, could also constitute a violation of **Art. 8 of the ECHR**. The Finnish authorities argue for their part that the applicant's asylum submission was unreliable, that they have been unable to establish his real identity with certainty and that in any case persons of low rank in the DSP are not at risk in the DRC. Concerning the part of the claim based on Art. 8, the Finnish government considers that the applicant and his wife and child could establish themselves either in the DRC or in the Russian Federation without difficulties. In spite of these arguments, the Court declared the **case admissible on both grounds**.

♦ ***Abdul-Vakhab Shamayev and 12 Others v. Georgia & Russia*, Decision of 16 September 2003, Appl. No. 36378/02**

The applicants are 13 persons of **Chechen origin**. Two of them are **Georgians** while the others have **Russian citizenship. Amongst these, two have refugee status** in Georgia. They were all arrested in August 2002 in Georgia for having crossed the border illegally and for bearing arms. On 6 August 2002, the Russian Federation (RF) authorities requested their **extradition** and submitted to the Georgian authorities the necessary documentation. In the RF they were charged for, *inter alia*, arms trafficking, illegal crossing of the border, murder and violence against RF military forces and terrorism. On 4 October 2002, 5 of them were extradited from Georgia to the RF and placed in detention in a secret location in Stavropol. Russian lawyers were appointed for their defence. The 8 others remained in detention in Tbilissi. The 2 refugees and the 2 Georgian nationals will in any case not be extradited. The

[1] *Kutić v. Croatia*, Judgement of 1 March 2002, Appl. No. 48778/99, Update January-June 2002, Part 5.3 of the UNHCR Manual on Refugee Protection and the ECHR.

initial interim measure, whereby the Court asked the Georgian authorities not to extradite the 13 applicants, was extended once for those who remained in detention in Georgia. On 26 November 2002, on the basis of guarantees provided by the Russian authorities concerning the already extradited applicants and the future judicial treatment of the others, the Court decided not to prolong further the interim measure. Before the Court, the extradited applicants claim that they did not have an effective remedy against the extradition decision **(Art. 13)** and that, given their detention conditions in the RF, they do not have the possibility of properly preparing their defence **(Art. 6 §§ 1 & 2)**. All of them argue that their extradition to the RF exposes them to *i)* the risk of being sentenced to the death penalty or the risk of being killed **(Art. 2)** and *ii)* the risk of being subjected to ill-treatment while in detention **(Art. 3)**. The Court declared the case **admissible on all those grounds** and has also decided to examine the detention situation of the applicants in Georgia under **Art. 5** of the ECHR.

B. Cases declared inadmissible

♦ ***Milovan Tomic v. United Kingdom*, Decision of 14 October 2003, Appl. No. 17837/03**

The applicant is a **Croatian national of Serb origin from Eastern Slavonia**. In April 1991, he joined a **Territorial Defence Unit**. While the conflict escalated, he joined a special forces unit, the Scorpions, where he became lieutenant. In December 1997, the applicant moved to Serbia as he feared reprisals following the Erdut-Zagreb agreement. In March 2001, he left Serbia for **Ireland, where his first asylum application was rejected**. He then went to the UK and applied for **asylum in January 2002**. His asylum application was **rejected** in first instance because it was considered that there was no longer any risk in returning to Croatia for persons such as the applicant. This decision was reversed in August 2002 by the Adjudicator who found that due to his position in the special forces unit and because of his ethnicity the applicant would face persecution. The Immigration Appeal Tribunal decided finally to confirm the first instance decision and rejected the asylum claim. Before the Court, the applicant argues that his **return to Croatia would constitute a violation of Art. 3 and Art. 8 of the ECHR because of his past military responsibilities and also because of the discrimination to which Serbs are confronted with in various aspects of life (housing, employment, etc.)**. He claimed also that he would face arbitrary detention and trial, in violation of **Art. 5 and Art. 6** of the ECHR. The Court, taking into consideration various sources of information (UNHCR, OSCE, CoE Parliamentary Assembly monitoring reports) considered that while it is true that the situation of ethnic Serbs in Croatia is still difficult, there were no indications that the applicant would particularly face treatments reaching the necessary level of severity if returned to Croatia. The case was therefore declared **inadmissible on all grounds**.

♦ ***Florencia Alfonso and Maria Janete Antonio v. the Netherlands*, Decision of 8 July 2003, Appl. No. 11005/03**

The applicants are **Angolan nationals** who sought **asylum** in the Netherlands in March 1999. They are the wife and the minor child of an Angolan who was granted a residence permit in the Netherlands in 1993 because of the situation that prevailed in Angola at that time. He later obtained **Dutch citizenship**. The applicants' claim for asylum was rejected because it was determined that prior to arriving in the Netherlands they had obtained an entry visa for Portugal, where they had transited. Portugal accepted the responsibility of examining the applicants' asylum claim. However, the first applicant **applied for a residence permit in order to stay with her husband in the Netherlands**. The Dutch authorities rejected this

request, arguing that there was no authenticated document proving the marriage and that in any case the applicant's husband did not meet the income criteria required under immigration legislation. The Dutch authorities concluded that the **applicants could live their family life in Angola, where the husband was also originally from**. Before the Court, the applicants argued that the decision of the Dutch authorities constituted a violation of **Art. 8 of the ECHR** and, because of the general situation prevailing in Angola a **violation of Art. 3** of the ECHR if returned there. The Court found that the applicants and the head of family all come from Luanda, where the situation is now considered to be acceptable, and that they have substantial links with Angola. Moreover, it has not been argued that any of their relatives still living in Angola have safety problems. Therefore, the Court concluded that there has been no violation of Art. 8 of the ECHR. Concerning the part of the claim based on Art. 3, the Court decided that there was no evidence that the applicants would be subjected to the kind of severe ill-treatment proscribed by Art. 3 of the ECHR. The case was therefore declared **inadmissible on all grounds**.

C. Cases adjourned

♦ ***Maria Isabel Ariztimuno Mendizabal v. France*, Decision of 18 September 2003, Appl. No. 51431/99**

The applicant is **a Spanish national of Basque origin**. She has been living in France since 1975 and obtained **refugee status in 1976**. The status was **withdrawn in 1979** following the change of circumstances in Spain. Since then, she has been receiving renewable short term residence permits, pending the issuance of a five year residence permit. Her administrative complaint against the delay in issuing this permit remained unfruitful. Before the Court she argues that the length of procedure before of the administrative jurisdictions violated **Art. 6** of the ECHR. She also claims that the refusal to issue a five year residence permit constitutes a violation of **Art. 8 and Art. 2 Prot. 4 (freedom of movement)**. She considers that the absence of obligation for the authorities to issue her a five year residence permit pending the outcome of the judicial administrative proceedings violates **Art. 13 of the ECHR**. While, in accordance with its jurisprudence[2], the Court declared the part of the claim based on Art. 6 inadmissible, it decided **to adjourn the examination of the rest of the case** because of lack of elements and therefore communicated this to the government, to seek further information.

D. Cases struck off the list

♦ ***Miriam Abraham Lunguli v. Sweden*, Decision of 1 July 2003, Appl. No. 33692/02**

The applicant, **a national of Tanzania**, applied for **asylum** in Sweden in 2000 for fear of female genital mutilation (FGM). In 2001, her application was rejected on the basis that since she was over the age of 15 she would no longer be exposed to the risk of genital mutilation in her homeland. All successive appeals failed. She went into hiding but was ultimately found and placed in a detention center pending expulsion. She then made a new application for residence permit with the Appeals Board, indicating that two of her sisters were subjected to FGM. On 12 December 2002, on the **basis of a new report from the Swedish Embassy in Tanzania mentioning that FGM was prevalent in the country**, the Appeals Border decided **to grant the applicant a permanent residence permit** and to quash the expulsion decision. The case was consequently **struck out of the Court's list**.

[2] Notably *Maaoui v. France*, Judgement of 5 October 2000, Appl. No. 39652/98

E. Friendly settlements

Nothing to report.

F. Applications communicated to governments

♦ ***Behrami v. France*, Decision of 16 September 2003, Appl. No. 71412/01**

The first applicant is a **Kosovar**, one of whose children was killed and another severely injured, when a group of children played with undetonated cluster bombs dropped during the NATO bombardments in 1999. The applicant maintains that France is responsible for the death, because the incident took place in the part of Kosovo which is under the jurisdiction and **control of French KFOR troops**, who had failed to mark the site and/or defuse the bombs, which they knew to be in the area. The case has been communicated under **Art. 2 of the ECHR**.

♦ ***Olaechea Cahuas v. Spain*, Appl. No. 24668/03**

The applicant is a **Peruvian national** who was arrested in Spain because of his alleged membership of the *Sentero Luminoso*. He was to be extradited to Peru for acts of terrorism. In July 2003, the *Audienca Nacional* authorised his extradition, under guarantees from the Peruvian authorities that the applicant's physical integrity will be respected and that neither the death penalty, nor life imprisonment would be requested against him. All the applicant's recourses against the extradition decision remained unsuccessful. Before the Court he claims that his extradition would constitute a violation of Art. 3 and Art. 6 of the ECHR. The Court asked Spain not to extradite the applicant, but the interim measure was disregarded.[3] The case has therefore been communicated under **Art. 3, Art. 6 and Art 34 (right to apply to the Court) of the ECHR**.

♦ ***Liton v. Sweden*, Decision of 23 September 2003, Appl. No. 28320/03**

The applicant, a **Bangladeshi national**, arrived in Sweden in 2001 and applied for **asylum** on grounds of having been arrested and tortured in Bangladesh due to his **political activities** as a member of an opposition party. The application was refused by the Migration Authority, which considered that the applicant's political activities had been very limited and had not led to a prosecution or a conviction, which demonstrated that there was no real risk for him. An expulsion order was issued. The applicant appealed against this decision, asserting that he had been prosecuted and convicted for attempted murder, and submitting as evidence a warrant for his arrest in Bangladesh. Medical reports stated that the applicant suffered from Post Traumatic Stress Disorder and required psychiatric treatment. The Aliens Appeal Board nevertheless rejected the appeal. The applicant lodged a new application for asylum and requested that his expulsion be stayed. In September 2003, the Board decided not to suspend the enforcement of the expulsion order. Under Rule 39 of the Rules of Court, the Court requested the Government not to expel the applicant to Bangladesh until further notice. The case has been communicated **under Art. 3 of the ECHR**.

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[3] See the case of *Mamatkulov & Abdurasulovic v. Turkey*, Judgement of 6 February 2003, concerning the indirect binding nature of interim measures. Reported in Update January-June 2003, Part 5.5 of the UNHCR Manual on Refugee Protection and the ECHR.

♦ ***Youatou v. United Kingdom*, Appl. No. 12010/03**

In 1996, the applicant, **a national of Cameroon**, was **refused asylum in the United Kingdom**. He returned to the United Kingdom in January 2002 and again applied for asylum, claiming fear of detention and ill-treatment because of his **involvement in proceedings against the President of Cameroon** before Belgian courts, where he was to provide evidence of torture by the security forces in Cameroon. He maintains that in 2000 he was arrested and beaten by the security forces when he was taking photographs of a mass grave of persons allegedly killed by the Operational Command ("OC"). Subsequently, two human rights NGOs, which were in the process of filing a complaint against the President of Cameroon in Belgium, approached him to provide evidence of human rights abuses in his country. He affirms that the authorities became aware of the persons who were collaborating with these NGOs, and that his girlfriend was arrested as a result of this in December 2001. The asylum application was first rejected by the Secretary of State, and on appeal by the Adjudicator, as they found it lacking in credibility and unconvincing. Despite new evidence submitted by the applicant, their decision was upheld by the Immigration Appeal Tribunal. Leave to apply for judicial review was refused by the High Court. The applicant made a further asylum application and made fresh representations to the Secretary of State in July 2003. The application was rejected. The case has been **communicated under Art. 2, Art. 3 and Art. 5 of the ECHR. The Court has applied Rule 39**.

♦ ***Fashkami v. United Kingdom*, Appl. No. 17341/03**

The applicant, a **national of Iran**, requested asylum in the United Kingdom, claiming fear of persecution because of his **homosexuality**. He claims that following a visit of the security forces to the house where he was living with his partner, he was arrested and held in custody for more than three months. He submits that if returned to Iran, he would run the risk of facing the death penalty as punishment for his homosexual behaviour. The claim was first examined by the Secretary of State, who found it lacking in credibility and rejected it on the ground of **not being satisfied that the applicant was in fact Iranian**. On appeal, the Adjudicator also rejected the claim after having evaluated the risk for homosexuals in Iran. He noted that despite harsh legislation against homosexual acts, the burden of proof was high and convictions were hard to secure. Moreover, as the applicant had not expressed any prospect of continuing a relationship with his partner, no issue arose under Article 8. Leave to appeal against the Adjudicator's decision was therefore rejected. The case has been communicated under **Art. 3 of the ECHR**.

G. Rule 39 of the Rules of the Court – Interim measures

Nothing to report.

3. Supervision of execution of Judgements by the Committee of Ministers

♦ ***Loizidou v. Turkey*, ResDH(2003)190 of 2 December 2003**

In this decision, the Committee of Ministers satisfied itself that in accordance with the judgement of 28 July 1998 (damages), the government of Turkey paid the sum of 457 084,83 Cypriot pounds (+ 8% default interest since October 1998) to the applicant. The Committee of Ministers indicated in a second resolution adopted the same day (ResDH(2003)191) that the

consideration of the execution of the 18 December 1996 judgement (merits) will be resumed in due time.

♦ ***Samy v. the Netherlands*, ResDH(2003)168 of 20 October 2003**

In this decision, the Committee of Ministers satisfied itself that in accordance with the friendly settlement of 18 June 2002[4], the government of the Netherlands paid the applicant the indicated damages (3,000 Euros). In this case the applicant, an Algerian national, was kept in detention even though his deprivation of liberty became unlawful.

♦ ***Podkolzina v. Latvia*, ResDH(2003)124 of 22 July 2003**

In this decision, the Committee of Ministers satisfied itself that in accordance with the judgement of 9 April 2002[5] the government of Latvia paid the applicant the indicated damages (9,000 Euros) and amended the law on election to Parliament on 9 May 2002. The provisions requiring higher proficiency in Latvian language for all persons running for parliamentary election were deleted. In the information provided to the Committee of Ministers on this case, the government of Latvia also indicated that it expects all Latvian courts to give direct effect to the ECHR and the Court's jurisprudence to prevent future violations.

4. Other news

In November 2003, the working group in charge of drafting a **protocol reforming the control mechanism of the ECHR** finalised its interim activity report. The objectives the protocol would be to guarantee the long-term effectiveness of the Court, in view of the increasing number of applications and the substantial backlog of pending cases before the Court.

In its interim activity report, the working group indicated that it was considering various measures, such as;

- the setting up of a filtering mechanism,
- the possibility for the Commissioner for Human Rights to lodge applications with the Court against one or more State parties,
- the introduction of a new admissibility criteria reinforcing the subsidiary nature of the Court
- and the possibility for the Committee of Ministers to bring a case against a State party failing to execute a previous judgement.

The working group is due to present a final report in April 2004, for adoption of a protocol at the ministerial session of the Committee of Ministers in May 2004.

UNHCR
February 2004

[4] See Update January-June 2002, Part 5.3 of the UNHCR Manual on Refugee Protection and the ECHR, page 9.
[5] See Update January-June 2002, Part 5.3 of the UNHCR Manual on Refugee Protection and the ECHR, page 3.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.7 – Summaries of Judgements and Admissibility Decisions (January–June 2004)

1. Court Judgements

♦ ***Ayder and Others v. Turkey*, Judgement of 8 January 2004, Appl. No. 23656/94**

The applicants are **five Turkish nationals of Kurdish origin** whose homes and property have been destroyed during an operation by security forces in the town of Lice in south-east Turkey about 22 and 23 October 1993. While the applicants argue that their house was deliberately set alight by security forces, the Government claims that the damages resulted from a fight where the security forces responded to an attack launched by PKK's members. Despite an **investigation** conducted by the European Commission of Human Rights on 16-20 June 1997 to establish the disputed facts, no clear picture of the events emerged from the contradictory accounts given by the parties involved.
The applicants complained to the public prosecutor who did not formally record their complaints. Apart from an assessment of the damages, no investigation was lodged into allegations until the present application was referred to the respondent Government.
In its report of 21 October 1999, the Commission unanimously found that there had been a **violation of Article 3, 8 and 13** of the Convention and **Article 1 of Protocol No. 1**. The case was referred by the Commission to the Court on 30 October 1999.
Before the Court, the respondent Government objected that, in the absence of any attempts by the applicants to raise their Convention grievances before a domestic authority whereas administrative, civil as well as criminal-law remedies were available in the Turkish legal system, they could not be regarded as having exhausted domestic remedies as required by **Art. 35 § 1** of the Convention. The Court considered that the **particular circumstances of the case, including *inter alia* the absence of an effective investigation to identify the persons responsible for the alleged acts** as well as the violent situation prevailing in south-east Turkey at the time of the **events dispensed the applicants from the obligation to exhaust domestic remedies**. In doing so, the Court reiterated a flexible application of that rule.
As regard to the burning of the houses of the applicants, the Court held that the **conditions in which the possessions of the applicants have been deliberately destroyed** by the security forces as well as **the fact that the applicants and their families were forced to leave their place of residence** amounted to inhuman treatment within the meaning of Article 3 and concluded to a **violation of Article 3** of the Convention. The Court underlined that **such a violation could by no means be justified** "even in the most difficult of circumstances, such as the fight against terrorism or organised crime" (§ 107). Similarly, the Court held that these acts constitute particularly grave and unjustified interferences with the applicants' rights to respect for their private and family life and home, and to the peaceful enjoyment of their possessions and **found violations of Article 8 of the Convention and Article 1 of Protocol No. 1.**

The Court argued that where an individual has an **arguable claim** that his or her home and possessions have been purposely destroyed by agents of the State, **Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation including effective access for the complainant to the investigation procedure**. In the present case, not only did the Government fail to indicate that the remedies were capable of providing any effective prospect of obtaining redress, but the State also omitted to carry out any investigation until notice of the present application was given to the Government. The late reference of the file by the Lice public prosecutor to the District Administrative Council (DAC) was not satisfactory for the Court, in so far as this body **cannot be regarded as independent**. Finally, the subsequent investigation carried out by the DAC proved to be incomplete. In these circumstances, the Court concluded that there has been a **breach of Article 13 of the Convention**.
It is worth noting that the applicants, referring to other similar cases of destruction and forced evacuation in south-east Turkey brought before the Commission and the Court, intended to demonstrate that these acts were part of a practice of the Turkish authorities. The Court **refused to recognise the systematic nature of these acts**.
Pursuant to **Article 41** of the Convention, the Court awarded a compensation to the applicants for the pecuniary damages (destruction of the houses and the other property) as well as the non-pecuniary damage considering the seriousness of the violations of the Convention. This judgement has become **final**.

- ***Thampibillai v. The Netherlands*, Judgement of 17 February 2004, Appl. No. 61350/00 and *Venkadajalasarma v. The Netherlands*, Judgement of 17 February 2004, Appl. No. 58510/00**

The applicants, Mr. Thampibillai and Mr. Venkadajalasarma, are both **Sri Lankan nationals** belonging to the **Tamil** population group and originating respectively from Vavuniya in the north of Sri Lanka and Jaffna, two areas controlled by the Tamil Tigers (the "LTTE"). Both applicants claimed they were detained by the Sri Lankan Army on suspicion of being LTTE supporters and were **subjected to ill-treatments** during their **detention**. Mr. Thampibillai, whose father was shot dead by the Sri Lankan Army in August 1991 on suspicion of helping the LTTE, was arrested on 12 January 1991 and detained for two weeks. Under continuous pressure from the Army who forced him to report daily to them after his release, he flew out of the country on 20 May 1994 using his own passport. Mr. Venkadajalasarma was released without charge after two days on 3 October 1995. He left the country using his own passport. When arriving in the Netherlands, respectively on 9 January 1995 and 2 November 1995, Mr. Thampibillai and Mr. Venkadajalasarma **applied for asylum or alternatively a humanitarian residence permit**. Their requests were refused. Both applicants complained that their expulsion to Sri Lanka would be in **violation of Article 3** of the Convention.
The Court applied **Rule 39 (interim measures)** of the Rules of the Court in both cases, indicating the Netherlands Government to suspend the execution of the expulsion measure pending the Court's decision.
Referring to **various international and Dutch Foreign Office reports**, the Court noted that, although not stable, the **security situation in Sri Lanka, in general as well as concerning the Tamils in particular, had improved considerably in recent years**.
The Court held that, in both cases, it was not established that the authorities harboured any suspicions that the applicants were involved in the LTTE and that they would therefore have an interest in them. Therefore, the Court concluded that it was unlikely that they would run a

real risk of being subjected to ill-treatment and that their expulsion to Sri Lanka **would not violate Article 3 of the Convention**[1]. These judgements have become **final**.

- ***Nachova and others v. Bulgaria*, Judgement of 26 February 2004, Appl. Nos. *43577/98 and 43579/98***

The applicants are **four Bulgarian nationals of Roma origin** whose close relatives were shot by military police trying to arrest them. The relatives were two men of **Roma origin** who were conscripts serving compulsory military service in an army division dealing with the construction of apartments. They were in detention for repeated absences without leave when they escaped from the construction site where they were confined. Some days later, they were shot by G. who was commanding the police unit instructed to arrest them as they intended to escape from the place they were hiding. The military investigation report concluded that G. had **acted in accordance with the regulations** and had tried to save the fugitives' lives by warning them to stop and not shooting at their vital organs. The military prosecutor accepted the conclusions and closed the investigation. The applicants' subsequent appeals to the Armed Forces Prosecutor's Offices were dismissed.

The applicants claimed that the victims were deprived of their lives in violation of **Article 2 § 2** of the Convention, that the **investigation** into the events was **ineffective** and thus in breach of that provision and of **Article 13** of the Convention and that the respondent State had failed in its obligation to protect life by law. They also alleged that the events complained of were **the result of discriminatory attitudes towards persons of Roma origin** and entailed a violation of **Article 14** of the Convention.

Article 2 of the Convention safeguards the right to life and sets out the circumstances when deprivation of life may be justified. These circumstances includes the case when such deprivation results from the **use of force which is no more than absolutely necessary in order to effect a lawful arrest or to prevent the escape of a person lawfully detained**.

The Court considered two crucial elements in keeping with the State's obligation to protect life. First, the planning of an arrest operation that may potentially result in the use of firearms must include the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger - if any - posed by that person. Second, clear legal rules must provide whether and in what circumstances, recourse to firearms should be envisaged if the person to be arrested tries to escape. The respondent State **failed to comply with these two requirements**. On the one hand, the preparation of the operation did not take into account the low level of threat posed by the conscripts who were unarmed. On the other hand, the relevant regulations on the use of firearms were incomplete. The Court thus found

[1] Note that in the Venkadajalasarma case, the violation was decided by a 6 votes to 1. In her dissenting opinion, Judge Mularoni criticised the partial use by the Court of the relevant international materials at its disposal. She especially referred to a letter as of 15 April 2002 addressed by UNHCR to a solicitor in London where UNHCR called for the authorities to take special care in relation to the return of failed asylum seekers to Sri Lanka when torture-related scars are reported on the body of the returnee. Alike other reports and statements by NGOs, this letter, although quoted by the Court (§51), was not given sufficient attention by the Court in its assessment of the risk. For Judge Mularoni, the well-established principle which by the Court considers the "present conditions" as "decisive for the solution of the case" (§ 63 of the judgement) raises great difficulties in the present case since it could lead to accept an expulsion, although the risk of inhuman or degrading is really high, provided that the respondent State waits for the "right moment". Judge Mularoni concludes that the expulsion of the applicant to Sri Lanka would be in violation of Article 3 of the Convention.

unanimously that **unnecessary and disproportionate force was used** and that Bulgaria was responsible for deprivation of life in **violation of Article 2 of the Convention**.
The Court also found that the general obligation to carry out an effective official investigation when individuals are killed which directly flows from the obligation under Article 2 was violated by the respondent State.
Concerning the alleged violation of **Article 14** of the Convention in conjunction with **Article 2**, the Court found that the respondent State had failed "to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events". Even though during the operation there had been certain facts such as a racist verbal abuse by at least one of the military police officer which should have alerted the authorities, no "thorough examination" was conducted. The Court thus concluded to a **violation of the procedural obligation flowing from Article 14 taken together with Article 2**.
The Court considered furthermore that the domestic authorities' failure to discharge that duty should have incidence in the examination of the allegation of a "substantive" violation of Article 14. The Court recalled that the standard of proof it applies is that of "proof beyond reasonable doubt"[2]. In the present case, the Court held that the respondent State's failure to pursue lines of inquiry lead to a shift of the burden of proof to the respondent State. Since this latter did not offer any convincing explanation showing that the events had not been the result of a prohibited discriminatory attitude on the part of State agents, the Court concluded there had been **a violation of Article 14 taken together with Article 2**. In doing so, the Court considered a number of additional factors as "**highly relevant**". The Court took into account the fact that this was **not the first case against Bulgaria** in which it has found that law enforcement officers had subjected Roma to violence resulting in death (See *Velikova* and *Anguelova* judgements where the Court noted that the complaints of racial motivation in the killing of two Roma in police custody in separate incidents were based on "serious arguments" although it concluded that no violation of Article 14 was established). In addition, the Court referred to the **general context** of alleged police brutality against Roma in Bulgaria reported by the European Commission against Racism and Intolerance, the European Committee for the Prevention of Torture as well as United Nations bodies.
Note this judgement is **not final** and has been referred to the Grand Chamber at the government's request.

- ***Cvijetic v. Croatia*, Judgement of 26 February 2004, Appl. No. 71549/01**

The applicant is a **Croatian national** who was the holder of a specially protected tenancy of a flat in Split. In 1994 she was forcibly thrown out of the flat by I., who moved in. The applicant successfully instituted proceedings against I. and in 1995 obtained a court order to have him evicted. As I. did not comply with the order to vacate the flat, the applicant applied for the execution of the decision. Despite the issuance of an execution order, the court adjourned the eviction several times, on one occasion due to the presence of war veterans obstructing the eviction and on another because of the failure of a physician to assist in the eviction of family B who had moved after I left. In the meantime, the applicant had bought the flat. The court

[2] Note that the European Roma Rights Centre, which was given leave to intervene pursuant to Rule 61 § 3 of the Rules of the Court, submitted that there was a pressing need for the Court to re-evaluate its approach to interpreting Article 14 of the Convention in cases of alleged discrimination on the basis of race or ethnicity and, in particular, to revise its stand on the applicable standard and burden of proof in such cases.

order was enforced in March 2002. The applicant complained that **the length of the enforcement proceedings to regain possession of her flat violates Article 6** of the Convention as well as her right to respect for her home under **Article 8**.
It had taken around **eight years** for the applicant to regain possession of her flat, of which **four years, four months and fifteen days** were taken into consideration by the Court in examining the reasonableness of the length of the proceedings (the Convention having entered into force of in respect of Croatia in November 1997). Although the domestic authorities had not taken any legislative measures to postpone or prevent the execution of the judgement ordering eviction, the Court held that the delays in carrying out execution were entirely attributable to them and concluded unanimously to a **violation of Article 6 of the Convention**.
The deficiencies of the legal system in overcoming obstruction of the execution of the judgement created or enabled a situation where the applicant was prevented from enjoying her home for a long period of time, **in breach of the State's positive obligations under Article 8** of the Convention. Having regard to this conclusion, the Court did not consider necessary to examine the complaint under Article 1 of Protocol No 1 separately.
Pursuant to Article 41, the Court awarded the applicant 10,000 Euros under all heads of damage. It also made an award in respect of costs and expenses. Note this judgement has become **final**.

♦ ***Radovanovic v. Austria*, Judgement of 22 April 2004, Appl. No. 42703/98**

The applicant is a **Serbia and Montenegro national** who was born in Austria where he lived for the first seven months of his life with his parents, who are both Serbia and Montenegro nationals and legally residents in Vienna. After living at his grand parents' in the former Federal Republic of Yugoslavia for a few years, he came back to Austria when he was 10 to live with his parents. He finished secondary school and completed a three-year-vocational training as a butcher. On 5 May 1993, he received an **unlimited residence permit**. In 1997, he was convicted of **aggravated robbery and burglary** and sentenced to 30 months' imprisonment, with 24 months suspended with a probationary period of three years since the court has found mitigating circumstances. However, pursuant to the 1992 Alien Act, he was issued **a residence prohibition of unlimited duration**. His various appeals to challenge the removal order were unsuccessful. After serving his prison sentence, he was **expelled** to Serbia and Montenegro on 4 February 1998. The applicant complained that the imposition of an unlimited residence ban against him was in breach of **Article 8 of the ECHR**.
The Court first noted that, without disregarding the serious nature of the applicant's offences, the applicant did **not** constitute **a serious danger to public order**. Second, given, *inter alia*, the duration of the residence of the applicant in Austria with his parents, the educational curriculum he completed in this country as well as the death of his grand parents living in Serbia and Montenegro, the Court found that the applicant's family and social ties with Austria were much stronger than with Serbia and Montenegro. The Court concluded unanimously that the residence prohibition of unlimited duration against the applicant was **disproportionate** and constituted a **violation of Article 8**. Note this judgement has become **final**.

♦ ***Connors v. United Kingdom*, Judgement of 27 May 2004, Appl. No. 66746/01**

The applicant and his family, who are **gypsies**, were **granted a licence in 1998 to occupy a plot at a gypsy site run by a local authority**. Apart from one year in which they had moved

into a rented house, they had lived at the site permanently for **thirteen years**. One of the conditions in their licence for the occupation of the plot was that no nuisance was to be caused by the occupier, his guests or any member of his family. Five months later the applicant's adult daughter was also granted a licence to occupy the adjacent plot. The local authority complained of the unruly conduct of the applicant's children and guests and warned him that the incidents of nuisance could jeopardise his occupation of the plot. In January 2000, **notice to quit** was served on the family, requiring them to vacate both plots. **No detailed reasons were given**. In March 2000, the local authority issued two sets of proceedings for summary possession, relying on domestic legislation which established that the **contractual right of occupiers of gypsy caravan sites could be determined by four week's notice**. The applicant's application for leave to apply for judicial review was refused by the High Court. In June 2000, the County Court granted a possession order. As the family had not given up possession on the date indicated in the court order, the local authority commenced **enforcement of the eviction** in August 2000. The applicant and his son were arrested for obstruction during the eviction operation. The family took up occupation on land nearby which was also owned by the local authority and where the presence of gypsies was sometimes tolerated. The local authority commenced new eviction proceedings against another group of gypsies on this piece of land and included the applicants as "unknown persons". The applicant alleges that following the eviction from this land he and his family were required to move on repeatedly. He subsequently separated from his wife, who chose to move into a house with the younger children. The son who stayed with him did not return to school as they were unable to remain in any place for more than two weeks, and his own health problems were aggravated.
The **parties agreed that the eviction** of the applicant and his family from the caravan site **disclosed an interference with his rights under Article 8** which was "in accordance with the law" and pursued the legitimate aim of protecting the rights of other occupiers of the site. The applicant complained that the eviction was **unnecessary and disproportionate**, in particular as he was not given the opportunity to challenge in a court the allegations made against him and his family. The respondent Government submitted that the interference was proportionate to its objectives and that the applicant had been able to challenge the local authority's decision before the High Court which found no evidence to doubt the reasonableness and procedural fairness of the local authority's decision.
The Court recalled that in assessing the necessity of the measure a margin of appreciation will be left to the national authorities. This margin will vary according to various factors including the nature of the Convention right at stake. In this context, the Court noted that the **procedural safeguards** available to the individual will be essential to determine whether the respondent state has not overpassed its margin of appreciation. The Court also recalled that the **vulnerable position of gypsies as a minority** should be taken into account both in the relevant regulatory framework and in reaching decisions in particular cases. In the present case, the Court considered that the central issue was whether the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights. The respondent state argued that pursuant to this specific legal framework, these sites are **exempted from security of tenure provisions on the ground that flexibility is needed for their management**. The Court was not satisfied with this argument. Nor was it with the assertion that summary eviction of the occupiers of these sites was a tool in addressing their nomadic lifestyle and anti-social behaviour since this statutory scheme does not apply to privately run gypsy sites where, however, the same consideration should prevail. The Court concluded that the power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not

been convincingly shown to respond to any specific goal. The eviction of the applicant had not been attended by the requisite procedural safeguards and thus could not be regarded as justified by a "pressing social need" or proportionate to the legitimate aim pursued. There had accordingly been a **violation of Article 8**.
Pursuant to Article 41, the Court awarded the applicant 14,000 Euros in respect of non-pecuniary damage. Note this judgement is **not final**.

- ***Altun v. Turkey*, Judgement of 1 June 2004, Appl. No. 24561/94**

The applicant is a **Turkish national** who lived in Akdoruk south east Turkey. The Court found that his house, belongings and livestock had been deliberately burned down before the eyes of members of his family on 13 November 1993 by Turkish military forces. They were obliged to leave their village The Court held that this incident must have caused him suffering of sufficient severity for these acts to be categorised as inhuman treatment within the meaning of **Article 3** and therefore concluded to a **violation** of this provision of the Convention. The Court also held that these acts constituted a **violation of Article 8** of the Convention and of **Article 1 of Protocol No. 1**. The Court observed that following the burning of his house and belongings, the applicant had lodged a complaint with the Kulp public prosecutor. The Kulp public prosecutor's failure to carry out a thorough and effective investigation into the applicant's allegations, the transfer of the complaint to the Kulp Administrative Council which lacks requisite independence and impartiality as well as the denial of the applicant's access to any other available remedy constituted a breach of **Article 13** of the Convention. Pursuant to **Article 41**, the Court held the respondent State to be paid 22,000 Euros in respect of pecuniary damage, 14,500 Euros in respect of non-pecuniary damage and 15,000 Euros in respect of costs and expenses. This judgement is **not final**.

- ***Freimann v. Croatia*, Judgement of 24 June 2004, Appl. No. 5266/02**

The applicant is a **national of Croatia and Germany** whose house in Slavonski Brod was blown up by unknown perpetrators. On 4 October 1995 she instituted civil proceedings seeking damages from the Republic of Croatia. Pursuant to the 1996 amendments to the Civil Obligations Act, the **case was stayed** by the Municipal Court. Pursuant to the Damage from Terrorist Acts and Public Demonstrations Act 2003, the proceedings resumed on 4 December 2003. Before the Court, the applicant claimed, that the enactment of the 1996 Act violated her right of access to court guaranteed by **Article 6 §1** of the Convention. The Court found in accordance with the Kutic jurisprudence[3] that the long period (more than seven years) for which the applicant was prevented from having her civil claim decided by domestic courts as a consequence of a legislative measure constituted **a violation of Article 6 §1 of the Convention**. This judgement is **not final**. Note that two friendly settlements were reached in two similar cases against Croatia on 24 June 2004 (*Jorgic v Croatia*, Appl. No. 70446/01 and *Kresovic v. Croatia*, Appl. No. 75545/01).

[3] *Kutic v. Croatia*, Judgement of 1 March 2002, Appl. No. 48778/99, Update January-June 2002, Part 5.3 of the *UNHCR Manual on Refugee Protection and the ECHR*.

♦ ***Dogan and others v. Turkey*, Judgement of 29 June 2004, Appl. Nos. 8803-8811/02 and 8815-8819/02**

The applicants are **15 Turkish nationals** - including Abdullallah Dogan - who lived in Boydas in south-east Turkey, where they or their fathers owned land and, in some cases, houses. The applicants alleged that in October 1994 the State security forces **forcibly evicted them from their village** due to the disturbances in the region at that time, and destroyed their property. Between 1999 and 2001 the applicants filed petitions with the Turkish administrative authorities requesting **permission to return** to their village and to **regain the use of their property**. In response to petitions from five of the applicants, the relevant authorities informed them their request would be considered under the "Return to Village and Rehabilitation Project", a scheme to resettle villagers evicted in the context of clashes between the security forces and suspected terrorists. After repeating their initial request to higher authorities including the Prime Minister's Office, three of the applicants where informed that **no return** could take place for security reasons. The other applicants received **no response**.
The applicants complained that the Turkish authorities refused to allow them to return to their village, in breach of **Articles 1** (obligation to respect human rights), **6** (right to fair hearing), **7** (no punishment without law), **8** (right to respect for private and family life), **13** (right to an effective remedy), **14** (prohibition of discrimination) and **18** (limitation on use of restrictions on rights) of the ECHR and **Article 1 of Protocol No. 1** (protection of property)[4]. The Court only agreed to examine the complaint under **Article 1 of Protocol No. 1 and Articles 8 and 13** of the Convention since the other complaints were either manifestly ill-founded or connected to the a/m claims.
The Government's preliminary objection of non-exhaustion of domestic remedies was dismissed by the Court. The existing administrative and civil law remedies were not considered to be adequate and effective since these proceedings do not allow determination of the allegations that villages were forcibly evacuated. As to the criminal remedy, the Court reiterated that the Administrative Council where the complaint about a criminal act by a member of the security forces is automatically transferred by the chief public prosecutor office cannot be regarded as independent[5].
Under **Article 1 of Protocol No. 1**, the Court held that despite the absence of title deeds the applicants' overall economic activities and the derived revenues constituted possessions for the purposes of this provision. After noting that the displacement in this state of emergency region of Turkey at the time of the events resulted from the violent confrontations between the security forces and members of the PKK[6], the Court observed that, although it was unable to determine the exact cause of the displacement of the applicants in the present case, the **denial of access to their possession** until 22 July 2003 as such shall be regarded as an interference with the applicants' right to use and dispose of their possessions. The Court held that, despite

[4] Note that approximately 1,500 similar applications (in which applicants from south-east Turkey complain about their inability to return to their villages) are currently registered with the Court which amounts to 25 % of the total number of applications against Turkey.
[5] See the case of *Ayder and Others v. Turkey*, Judgement of 8 January 2004, Appl. No. 23656/94 (above) where the Court held a similar reasoning concerning the assessment of the adequacy and effectivity of Turkish administrative, civil and criminal remedies in such circumstances.
[6] Reference is made by the Court to the Report of the Committee on Migration, Refugees and Demography on the Humanitarian situation of the displaced Kurdish population in Turkey adopted by Recommendation 1563 (2002) of the Council of Europe as well as the Report of the Representative of the Secretary-General on IDPs submitted to the UN Commission on Human Rights on 27 November 2002.

the seriousness of the security issue invoked by the respondent, this measure had deprived the applicants from their right to enjoyment of their possessions for almost 10 years and forced them to live in precarious conditions. Although the Court acknowledged the Government's efforts to remedy the situation of the IDPs in general (Return to village and rehabilitation project), it considered them **inadequate and ineffective for the purposes of the present case**. For the Court "the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicant to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to settle voluntary in another part of the country"[7]. The Court considered that the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the right of the applicants. The Court therefore held that there had been a **violation of Art. 1 of Protocol No. 1**. On the same grounds, the Court concluded to a **violation of Article 8** of the Convention. Finally for the same reasons pointed out by the Court concerning the exhaustion of domestic remedies, it concludes that there was no available effective remedy in respect of the denial of access to the applicants' homes and possession. Accordingly, there had been a **violation of Art. 13** of the Convention. Note this judgement is **not final**.

2. Court Decisions

A. Cases declared admissible

♦ ***Sardinas Albo v. Italy*, Decision of 8 January 2004, Appl. No. 56271/00**

Although these facts have been debated during the case, the Court assessed that the **applicant is a Cuban national** who had been granted the **status of lawful permanent resident in the United States in 1977**. He lost his status when he was convicted of aggravated felony of drug-trafficking by a US Court and issued with a **deportation order** on 29 June 1993. Since removal was not practical he was released from custody after posting a bond. The applicant was **arrested** on 6 August 1996 in **Milan** on suspicion of international drug trafficking and sentenced to 15 years' imprisonment, which was subsequently reduced to 11 years on appeal. In the meantime, the Italian Ministry of Justice granted the **two extradition requests** made by the **United States** authorities against the applicant. However, noting that criminal proceedings against the applicant were pending before the Como District Court, the Ministry decided to suspend his extradition. The applicant did not challenge the extradition orders before the regional administrative courts.

Relying on **Articles 3, 5 § 1 and 14** of the Convention, the applicant alleged that, if he were extradited to the United States, he would be **imprisoned indefinitely** (situation commonly known as "limbo incarceration") since the deportation order against him in the US would not be enforceable. Considering the circumstances, the Court indicates that the situation of **indefinite detention** faced by the applicant in the US had **not been sufficiently evaluated by the Italian authorities** and could give rise to concern that there was a **risk that the applicant's fundamental rights under Articles 3 and 5 of the Convention would be violated**. However, the Court found the application against the extradition orders

[7] In this connection, reference is made by the Court to the Principles 18 and 28 of the UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/add.2, 11 February 1998.

inadmissible since the applicant did not challenge these orders before the Regional Administrative Court which was considered an effective and accessible remedy by the Court. **Relying on Article 5 § 3 of the Convention**, the applicant complained of the length of his detention on remand. The Court dismissed the Government's objection for non-exhaustion of domestic remedies. While the applicant did not challenge the length of his deprivation of liberty before the Court of Cassation, the Court did not find that this remedy was sufficient and certain in practice since the Court of Cassation failed in some cases to apply Article 5 § 3 of the Convention directly. In view of the length of the detention on remand - the applicant's detention before trial and extradition lasted three years, two months and one day - the Court declared **admissible** the applicant's complaint concerning the length of his detention on remand.

♦ ***Mogos and others v. Romania*, Decision of 6 May 2004, Appl. No. 20420/02**

The applicants, a couple and their five children, are **stateless persons of Romanian origin.**[8] In 1990, they left Romania for Germany where they sought **asylum** claiming that being **Romas** they faced persecution. In 1993, they **renounced their Romanian nationality**. Their **application for asylum**, as well as their attempts to obtain residence permits in Germany were rejected at all stages of the procedure. On 7 March 2002, the applicants (with the exception of the first two children, who were married to German nationals) were **expelled** to Romania, notably pursuant to an **agreement concluded between the two States in 1998**, whereby Romania declared that it was prepared to accept its former national who had become stateless persons. Upon their arrival, the applicants alleged that they were arrested by the police and ill treated before being transferred to the transit centre. The applicants also claimed that on 1 April 2002, as they (except their youngest child) intended to help another stateless person being ill-treated by a number of policemen in the room next to their, they were assaulted by the policemen. These facts are contested by the respondent government. The applicants complained that these **ill-treatments** as well as the **living conditions** in the transit centre constituted violations of **Article 3** of the Convention. They also complained under **Article 5 § 1** of the Convention that since their arrival in the transit centre they were arbitrarily deprived of their liberty. They claimed that this deprivation of liberty also amounts to a violation of their right to leave any country including their own under **Article 2 § 2 of Protocol No. 4**. They alleged that the facts they complained of under Article 3 of the Convention and Article 2 of Protocol No 4 were **discriminatory** on the ground of their Gypsy origin and therefore contrary to **Article 14** of the Convention. Finally they claimed under **Article 34** of the Convention that their correspondence with the Court was deliberately hindered by the authorities of the respondent state.
The Government argued that the applicants' complaint under Article 3 of the Convention was not admissible since they had failed to exhaust all internal remedies. Given the important issue raised by this preliminary exception, the Court decided to combine this question to the examination of the content of the claim. The Court found that the applicants' complaint concerning alleged **ill-treatment upon their arrival** was manifestly ill-founded. On contrary, the Court found that the ill-treatments as of 1 April as well as the living conditions in the transit centre required an examination of the content of the complaint which was therefore declared

[8] For the part of the complaint concerning Germany, see *Mogos and Krifka v. Germany (Appl. No. 78084/01),* Update January-June 2003 of *UNHCR Manual on Refugee Protection and the ECHR*, pp. 5-6.

admissible. Similarly, in view of the elements of the case, the Court held that the complaint under Article 34 was **admissible**.
Concerning Article 5 § 1, the Court assessed whether the sojourn of the applicants in the transit zone amounted to a **detention** within the meaning of Article 5 § 1 of the Convention. The Court found in the present case that, contrary to the *Amuur* case where there was not such a possibility[9], the applicants had the **possibility to leave the transit centre thanks to a travel document delivered by the German authorities and that they clearly refused to enter the Romanian territory**. As a result, the Court held that the situation they complained of was not attributable to the respondent State. The Court therefore rejected the complaint on the ground that it was incompatible *ratione personae* with the provisions of the Convention. For the same reasons and given that the applicants could lodge appropriate administrative procedures within Romania to leave the country[10], the Court held that the alleged violation of **Article 2 § 2 of Protocol No. 4** was not attributable to the respondent state and shall therefore be declared **inadmissible**. The Court found that the complaint under **Article 14** was also **inadmissible**.

B. Cases declared inadmissible

♦ ***Nasimi v. Sweden*, Decision of 16 March 2004, Appl. No. 38865/02**

The applicant is an **Iranian national of Kurdish origin** whose sister is living in Sweden. After several failed attempts, he was granted **visas to visit the c**ountry on two occasions. After his second visit, he **applied for asylum**, claiming that he militated in an organisation which was against the Iranian Government. He alleged that the authorities had discovered subversive journals at his home, which had led to his imprisonment for two years. A year after his asylum application, he submitted in writing that he had also been tortured whilst in prison. His **wife and children** subsequently joined him in Sweden and also **applied for asylum**. The Migration Board rejected the applications and ordered the family to be **expelled** to Iran. In the family's subsequent appeals and applications for residence permits they submitted several statements from health professionals stating that the applicant suffered from post-traumatic stress disorder, as well as an Iranian document, which was purportedly a summons to appear before a revolutionary court. The expulsion order was not suspended but its enforcement was stayed following the Court's indication under Rule 39.
The Court held that it was unlikely that the Iranian authorities would have granted the applicant permission to leave the country on two occasions had he been politically active against the Government. The applicant had not made any specific allegations of torture, nor had he submitted a copy of the revolutionary court summons until long after his initial application for asylum, which called into question the veracity of his statements and the risk of him being subjected to treatment contrary to **Article 3** in Iran. Whilst the expulsion order had caused the applicant considerable stress, this harm did not emanate from any intentional acts of the authorities in Iran nor had it been substantiated that the applicant had been traumatised by experiences in Iran. His removal from Sweden would therefore not involve a

[9] See *UNHCR Manual on Refugee Protection and the ECHR*, *Part 4.2 - Selected Case Law on Article 5*, pp. 2-4.
[10] See *a contrario* the Baumann case in Update No. 16 of the *UNHCR Manual on Refugee Protection and the ECHR* (January 2001- July 2001), p. 2.

violation of Article 3 on account of the applicant's health condition. The Court declared the application **inadmissible**.

♦ ***F. v. United Kingdom*, Decision of 22 June 2004, Appl. No. 17341/03**

The applicant is an **Iranian national** who **entered the United Kingdom illegally** on or about 17 April 2001. He claimed **asylum** on the basis that he feared **persecution as a homosexual**. He stated that he and his partner were beaten and held in prison for three months and four days by the Security forces on ground of their homosexuality. The Secretary of State rejected his asylum application on the ground that it doubted about the credibility of his statement and about his Iranian nationality. Raising complaints under **Articles 3 and 8 of the Convention**, the applicant appealed to the Adjudicator who found that, despite the harsh punishment faced by Homosexual under Iranian law, **in practice it was extremely unlikely** that homosexual activity conducted in private would result in treatment contrary to Articles 3 and 8 of the Convention. In addition since a very **high burden of proof** is required for such offences under Iranian law - four eyewitnesses to any homosexual act - he doubted that the security forces had acted as reported by the applicant on the ground of his homosexuality. The Immigration Appeal Tribunal upheld the Adjudicator's decision and rejected the applicant's application for leave to appeal. Directions for the applicants expulsion have not been issued yet.
Before the Court, the applicant complained under **Article 2** of the Convention that he would be at risk of extra-judicial killing if expelled to Iran, under **Article 3** that he faced a real risk of **torture and ill-treatment**, under **Article 5** that he risked arbitrary detention, under **Article 6** that he would not receive a fair trial in the Iranian system and under **Article 8** that "his physical and moral integrity" aspect of his right to respect for private life would be infringed.
Examining together the complaints under Articles 2 and 3, the Court noted that the general situation in Iran did not foster the protection of human rights and homosexuals could be vulnerable to abuse. However, given, *inter alia*, the high burden of proof for homosexual offences, the **toleration in practice** of private homosexual relationships and the lack of credibility of the applicant's statement, the applicant has not established in this case that there are substantial grounds for believing that he will be exposed to a real risk of being subjected to treatment contrary to Articles 2 and 3. Similarly, the Court concluded that the complaints under Article 5 and 6 were **inadmissible**.
As regard to the complaint under Article 8, the Court noted that, whilst expelling persons who are at risk of treatment contrary to Articles 2 and 3 can engage the responsibility of Contracting States given the fundamental importance of these provisions, such compelling considerations do not automatically apply under the other provisions of the Convention. Indeed, while a ban against homosexual adult consensual relations would disclose in Contracting States a violation of Article 8, the same prohibition applied in a third state where an applicant is to be expelled does not necessarily engage the Respondent State's responsibility under Article 8.
Therefore, the Court admits that "on a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention". Consequently, the Court found that in the circumstances of the case the applicant's moral integrity would not be affected to a degree falling within the scope of Article 8 of the ECHR. For these reasons the Court unanimously declared the application **inadmissible**.

♦ ***Ndangoya v. Sweden*, Decision of 22 June 2004, Appl. No. 17868/03**

The applicant, a **Tanzanian national**, was granted a **residence permit** in Sweden on the basis of his marriage to a Swedish national. The couple, who had two children together, subsequently separated. The applicant was thereafter **convicted on two occasions**: firstly, for making unlawful threats and carrying knives in public places, and secondly, for aggravated assault after engaging in sexual contacts without disclosing to his partners he was HIV positive, and thus transmitting the infection to two women. The applicant was sentenced to six years' imprisonment. His **expulsion** from Sweden was ordered. Leave to appeal to the Supreme Court was refused. Whilst serving the prison sentence, the applicant filed several petitions for a revocation of the expulsion order. Before the Court he claimed **under Articles 2 and 3 of the Convention** that his **chances of receiving life-sustaining HIV treatment in Tanzania would be slim**. In addition, under **Article 8**, he complained that his close links to his children as well as his new relationship with a Swedish woman would be severely affected by expulsion. All the applicant's petitions were rejected.
The Court found that, although the applicant's circumstances in Tanzania would be **less favourable** than those he enjoyed in Sweden, this was not decisive. The applicant could obtain treatment and had some family support in his country of origin. Contrary to the case *of D. v. United Kingdom*[11], where the Court had found that the applicant's deportation would violate Article 3, taking into account the critical stage of his fatal illness had reached and the compelling considerations at stake, **the circumstances were not of such an exceptional nature that expulsion would violate Articles 2 and 3**. The Court therefore concluded that the application was **inadmissible**.
Concerning the complaint under **Article 8**, the Court found that the acts the applicant was convicted for were of the utmost gravity. The Court noted that since there was a risk that he could engage in further conduct of that type, the applicant's expulsion was not disproportionate to the aim of public safety and the prevention of disorder and crime pursued by the respondent State. The Court declared the application **inadmissible**.

♦ ***Salkic v. Sweden*, Decision of 29 June 2004, Appl. No. 7702/04**

The applicants are a **Bosnian Muslim family** which fled to Germany in 1992 due to alleged harassment and discrimination. They were returned to Bosnia-Herzegovina in 1998 and housed by the Refugee Authority in Tuzla. In 2000, they entered Sweden and applied for **asylum**. Their application was rejected as it was considered that they could return to their country without a risk of persecution on ethnic grounds. From their arrival in Sweden until their expulsion, all the members of the family were in contact with the Swedish health care system and under **psychiatric treatment**. Several medical certificates indicated that their **fragile mental health was linked to traumatic experiences and anxiety about the future**. Some doctors stated that the children would be **permanently damaged by expulsion**. The Migration Authorities, whilst acknowledging the difficult circumstances of the family, did not consider these were grave enough to constitute a violation of humanitarian standards if they were expelled, and, hence, rejected the **seven asylum applications** which the family submitted **in total**. The **expulsion was suspended** following a **request by the Court under Rule 39 of the Rules of Court** but once the Court decided not to prolong the interim

[11] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 4.1 - Selected Case Law on Article 3, p. 8.

measure, in March 2004, the family was expelled. A psychologist who examined the children upon **their arrival in Tuzla stated that adequate treatment for them was not available in Bosnia-Herzegovina**. Before the Court, the applicants alleged that their **expulsion to Bosnia-Herzegovina would constitute a violation of Articles 2 and 3** of the ECHR
The Court found that despite the fact that the applicants had been through traumatic experiences, suffered severe stress and required long-term treatment, there existed health care centres which the applicants could rely on in Bosnia-Herzegovina, even if they were not of the same standards as those in Sweden. Given the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, and the fact that the case did not disclose exceptional circumstances, the Court concluded that the expulsion was not contrary to this provision and declared the application **inadmissible**.

C. Cases adjourned

Nothing to report.

D. Cases struck off the list

♦ ***Boztas and others v. Turkey*, Decision of 9 March 2004, Appl. No. 40299/98**

The applicants are three **Turkish nationals of Kurdish origin** who suffered grave injuries and destructions of their properties due to the shelling of their village by the Turkish military forces on 30 July 1997. This village was located in south-east Anatolia where emergency rule was applied at that time because of grave ongoing fights between the Turkish security forces and the PKK movement. They complained before the Court that these constituted a violation of **Article 2 of the Convention as well as Article 1 of Protocol No. 1**. In addition, they complained under **Article 6** about the lack of an effective investigation into the alleged facts. The application was judged **admissible** by the Court and Turkey suggested a **friendly settlement** which was accepted by the applicants. It consisted in a statement of regret, undertaking to take appropriate measures and an *ex gratia* payment of 61,000 Euros plus 7,500 Euros for the costs. The case was consequently **struck out of the Court's list**.

E. Friendly settlements

Nothing to report.

F. Applications communicated to governments

♦ ***Vikulov and others v. Latvia*, Decision of 25 March 2004, Appl. No. 16870/03**

The applicants are **Russian nationals** who resided in Latvia since 1985 when the husband (first applicant) entered the Latvian territory as an officer of the Soviet Union Army with his wife (second applicant). Their son (third applicant) was born one year later. Following its independence in 1991, Latvia signed a **treaty with Russia on withdrawal of the Russian troops in April 1994**. Shortly after the Russian officer was demobilised in September 1998, the **temporary visas of the applicants expired**. The Latvian authorities refused to issue a

resident permit to the applicants who were addressed an **expulsion order** in 2000. Since the application in annulment failed, the applicants were asked to leave the country at the latest at the end of the school year. Arrested by the Immigration Police after this deadline expired, the applicants refused to sign the statement of offence drafted in Latvian language, which they did not understand. They were detained before being forcibly expelled in September 2003.
The applicants claim that the delay between the arrest and the expulsion constitutes a **violation of Articles 5(1)(f)** of the Convention. In addition the fact that the statement of offence was only drafted in Latvian, a language they do not understand, violates **Article 5(2)** of the Convention. They claimed that the expulsion procedure would **violate Articles** 3, 8, 14 and 34 (right to apply to the Court) of the ECHR. With regard to Article 8, the applicants claimed that they had a network of strong personal and family relations in Latvia since *inter alia* the parents of the second applicant were permanent residents in this country. The case has been **communicated under Art. 3, Art. 5(1)(f), Art. 5(2), Art. 8, Art. 14 and Art. 34**[12]. It was judged **inadmissible under Art. 2 of Protocol No. 1** (right to instruction) since the Latvian authorities allowed the third applicant to finish his school year and it was not demonstrated by the applicants that he would be prevented to attend secondary education back in Russia. The Court also found the application inadmissible **under Art. 1 of Protocol No. 1, Art. 1 of Protocol No. 7, Art. 4 of Protocol No. 4**.

♦ ***Bader v. Sweden* Decision of 27 April 2004, Appl. No 13284/04**

The applicants, who are a family of **Syrian nationals**, arrived in Sweden in 2002 and applied for **asylum**. They claimed that the father had been imprisoned, tortured and ill-treated by the Syrian Security Police. Their asylum applications were rejected, as well as their appeals, by the Migration Authorities on the ground that they had not shown that they risked persecution if returned to Syria. On the basis of new information received by the applicants that the father had been convicted, in absentia, of complicity to murder and sentenced to death by the Regional Court in Syria, they submitted a new application for asylum, and the **expulsion order was stayed**. In the meantime, the Swedish embassy in Syria verified that the judgement was authentic and received a report from a local lawyer stating that it was probable that the case would be re-tried in court if the accused were found. The report also indicated that it was very rare that death sentences were imposed at all by the Syrian courts nowadays and if a case was "honour related", such as the one the father was charged with, it was generally considered as an extenuating circumstance leading to a lighter sentence. On the basis of this information, the Aliens Appeals Board rejected the new asylum request, finding that the applicant did not have a well-founded fear of being arrested and executed if returned to Syria. The applicants complained that the expulsion to Syria if executed would constitute a **violation of Article 2 and Article 3 of the ECHR**. The case has **been communicated to the Swedish government under Articles 2 and 3**.

[12] Note that the Court held on 9 October 2003, in *Slivenko v. Latvia*, that the removal by the Latvian authorities of a retired Russian officer and his family residing in Latvia constituted a violation of Article 8 §1. The Court noted *inter alia* that in specific circumstances the implementation of the Treaty on Withdrawal of Russian Troops can be problematic from the point of view of the Convention. Update July-December 2003, Part 5-6 of the *UNHCR Manual on Refugee Protection and the ECHR*.

♦ ***Headley v. United Kingdom*, Decision of 6 June 2004, Appl. No. 39642/03**

The first applicant is a **Jamaican national** who submits the complaint together with his wife and two children. In 1993, the applicant suffered serious injuries after being shot twice by gang members in Jamaica. His girlfriend at the time was killed during one of the shootings. He entered the United Kingdom on a medical visa in 1994, and in 1996 he met his present wife. The couple had a child together and in 1998, the first applicant's son, born to his deceased girlfriend in Jamaica, joined them in the United Kingdom. In 2000, the applicant was convicted of a drugs offence and sentenced to seven years' imprisonment. Although the trial judge did not recommend that the applicant be deported, the Secretary of State made a **deportation order** in 2002. The applicant appealed and claimed **asylum** on the basis that he would **risk violence from gang members** if returned to Jamaica. His asylum application and subsequent appeals were refused. A report by a psychologist states that the applicant's son who was born in Jamaica has developed a high level of emotional dependence with his step-mother and wider family in the United Kingdom and that it would be damaging for him to return with his father to Jamaica, or to stay in the United Kingdom becoming permanently separated from his father. The applicant complained that if executed the removal order would constitute a **violation of his right to respect for family life** under Art. 8 of the Convention. The claim has been **communicated to the British government under Art. 8 of the ECHR**.

♦ ***Ryabikin v. Russia*, Appl. No. 8320/04**

The applicant is a **Turkmen national of Russian ethnic origin**. He was the head of a construction company that entered a contract with the Government. Following problems in the implementation of the contract, the applicant brought criminal proceedings against two public officials. He claims that after lodging the complaint he received threats from law-enforcement bodies and decided to leave the country. Prior to leaving, he applied for Russian citizenship at the Russian Embassy. He entered Russia in 2001 with **migrant status**. In 2003, he applied for **asylum**, which was rejected on the ground that he did not qualify as a refugee and had probably left Turkmenistan to escape from criminal proceedings. **The applicant's appeal against the rejection of refugee status is pending**. In the meantime, criminal proceedings had been initiated against the applicant in Turkmenistan and he was placed by the Turkmen authorities on an international wanted list. In February 2004, during a visit to the Passport and Visa Service concerning his pending application for citizenship, the applicant was arrested. The District Court ordered his detention pending extradition to Turkmenistan. The City Court upheld this decision, without specifying the applicant's term of detention. No decision on his extradition has been taken so far by the Russian authorities. The claim has been **communicated under Articles 3 and 5 of the ECHR**

G. Rule 39 of the Rules of the Court – Interim measures

Nothing to report.

3. Supervision of execution of Judgements by the Committee of Ministers

Nothing to report.

4. Other news

On **30 January 2004**, the Parliamentary Assembly of the Council of Europe has elected Mrs Ljiljana Mijovic as the first judge of the European Court of Human Rights in respect of **Bosnia and Herzegovina**.

On **17 March 2004**, the European Court of Human Rights held a Grand Chamber hearing on the merits in the case of *Mamatkulov and Askarov v. Turkey* (Appl. Nos. 46827/99 and 46951/99)[13].

On **19 March 2004** two judges of the European Court of Human Rights completed a **fact-finding mission** in Helsinki, in the case *N. v. Finland* (Appl. No. 38885/02) which was declared **admissible** by the Court on 23 September 2003[14].
On **28 April 2004**, five new judges have been elected (Renate Jaeger in respect of Germany, David Thór Björgvinsson in respect of Iceland, Danute Jociene in respect of Lithuania, Egbert Myjer in respect of the Netherlands and Sverre Jebens in respect of Norway) and thirteen sitting judges re-elected by the Parliamentary Assembly of the Council of Europe to the European Court of Human Rights.

The new Protocol No. 14 to the European Convention on Human Rights was adopted by the Committee of ministers during its **May 2004** session and is **open for signature** of the member States[15]. This new Protocol aims at guaranteeing the **long-term effectiveness of the Court**. Unlike Protocol No. 1 11, Protocol No. 14 makes no radical changes to the control system established by the Convention. The changes relate more to the functioning than the nature of the system. Consequently, as stated by the Court's president Luzius Wildhaber, the Court is facing a "critical year" in terms of this reform since it is still struggling with an ever-growing volume of cases pending - currently some 65,800 applications.
In order to improve and accelerate its functioning amendments are introduced in three main areas:

- **reinforcement of the Court's filtering capacity** in respect of the mass of unmeritorious applications by making a single judge competent to declare inadmissible or strike out an individual application. The single judges will be assisted by non-judicial rapporteurs, who will be part of the registry.
- **a new admissibility requirement** which empowers the Court to declare inadmissible applications where the applicant has not suffered a significant disadvantage and which, in terms of respect for human rights, do not otherwise require an examination on the merits by the Court
- **the competence of the committees of three judges is extended to cover repetitive cases**. They are empowered to rule, in a simplified procedure, not only on the admissibility but also on the merits of an application, if the underlying question in the case is already the subject of well-established case-law of the Court.

[13] See Update No. 20 January-June 2003 of the *UNHCR Manual on Refugee Protection and the ECHR*, p. 1.
[14] See Update July-December 2003 Part 5.6 of the *UNHCR Manual on Refugee Protection and the ECHR*, p. 4.
[15] The text of Protocol No. 14 as well as the Explanatory report are available on http://conventions.coe.int/.

These elements of the reforms seek to enable the Court to concentrate on those cases that raise important human rights issues
In addition, joint decisions on admissibility and merits of individual cases are encouraged. For the purpose of facilitating the **supervision of its execution**, the Committee of Ministers may decide, by a two-thirds majority, to bring proceedings before the Grand Chamber of the Court against any Member State which refuses to comply with the Court's final judgement in a case to which it is party. The Committee of Ministers will in certain circumstances also be able to request the Court to give an interpretation of a judgement.
It should be noted that judges are now elected for a **single nine-year term**. Finally an amendment has been introduced with a view to possible accession of the European Union to the Convention.
As of 19 August 2004 **19 member States have signed Protocol No. 14**. Pursuant its Article 20, this Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol (either by signature without reservation as to ratification, acceptance or approval or by signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval).
On **27 May 2004**, the President of the European Court on Human Rights appointed Mrs Constance Grewe as an international member of the **Constitutional Court of Bosnia and Herzegovina**.

On **2 June 2004** the Grand Chamber of the European Court of Human Rights has delivered its **decision concerning the first request to the Court for an advisory opinion under Article 47 of the Convention**. The Court concluded unanimously that the request for an advisory opinion, submitted by the Council of Europe's Committee of Ministers**, did not come within the Court's advisory competence**.
The CIS Convention provides for the establishment of a Human Rights Commission of the CIS (the CIS Commission) to monitor the fulfilment of the obligations entered into by States.
The Committee of Ministers accepted the advice of the Parliamentary Assembly contained in its recommendation 1519(2001) and requested the Court to give an advisory opinion on "the co-existence of the Convention of the CIS and the European Convention on Human Rights". The Court held that this question related essentially to the specific question whether the CIS Commission should be regarded as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2(b) of the Convention[16]. This question was therefore a "legal question" in accordance with Article 47 § 1 of the Convention.
However, the Court noted that since **three States Parties to the European Convention on Human Rights had signed (namely Armenia, Georgia and Moldova) and one had ratified (namely Russia) the CIS Convention** and that the rights set out in this instrument were broadly similar to those in the European Convention on Human Rights, it could not be excluded that the Court might have to consider this question in the context of a future

[16] If the CIS Commission was to be covered by Art. 35 § 2(b), the Court would be precluded from examining a case which would have already been submitted to this body. In its Recommendation 1519(2001), the Parliamentary Assembly of the Council of Europe argued that since the CIS Commission was rather weak as an institution for the protection of human it should not be regarded as a procedure falling within the scope of this provision.

individual application. Therefore, in the present case, the Court interpreted Article 47 § 2 of the Convention[17] as excluding its competence.

On **9 June 2004**, the European Court of Human Rights held a Grand Chamber hearing on the merits in the case of *Öcalan v. Turkey* (Appl. No 46221/99)[18]. The case **was referred to the Grand Chamber** at the requests of the applicant and the Government on 11 June 2003.

On **24 June 2004**, Dean Spielmann **(Luxembourg)** was elected as judge at the European Court of human Rights.

On **29 June 2004** the European Court of human Rights decided **not to grant a request for an interim measure submitted by lawyers acting on behalf of Saddam Hussein**. These latter asked the Court "to permanently prohibit the United Kingdom from facilitating, allowing for, acquiescing in, or in any other form whatsoever effectively participating, through an act or omission, in the transfer of the applicant to the custody of the Iraqi Interim Government (IIG) unless and until the IIG has provided adequate assurances that the applicant will not be subject to the death penalty". They rely on **Articles 2 and 3** of the Convention and **Article 1 of protocols Nos. 6** (abolition of the death penalty in time of peace) and **13** (abolition of the death penalty in all circumstances).

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[17] Article 47 § 2 of the Convention provides that "such opinion shall not deal with any (…) other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention."

[18] See Update July-December 2003 Part 5.6 of the *UNHCR Manual on Refugee Protection and the ECHR*, p. 3.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.8 – Summaries of Judgments and Admissibility Decisions (July–December 2004)

1. Court Judgments

♦ ***Ilascu and Others vs. Moldova and the Russian Federation*, Judgment of 8 July 2004, Appl. No. 48787/99**

- *Jurisdiction of States*
  - *Responsibility of Russia in respect of acts of the "Moldavian Republic of Transdniestria"*
  - *Positive obligations of the State (Moldova) with regard to parts of its territory over which it has no control*
- *The Court's jurisdiction ratione temporis*
- *Violations of Articles 3, 5(1)(a), 34*

Pursuant to Article 30 of the ECHR[1], the competent Chamber relinquished jurisdiction in favour of the **Grand Chamber** which declared the application admissible on 4 July 2001[2].

Facts:

Messrs. Ilie Ilaşcu, Alexandru Leşcu, Andrei Ivanţoc and Tudor Petrov-Popa, **Moldovan** nationals at the time when they lodged their application, were political leaders of the Popular Front, a Moldovan political party in favour of the reunification of Moldova with Romania.

They were arrested in Tiraspol in June 1992 by the *Transdniestrian* authorities and accused of various illegal activities against the *Moldovan Republic of Transdniestria* ('MRT'), a region of Moldova, which declared independence in 1991 but has not been recognised by the international community. In December 1993, the Supreme Court of the 'MRT' sentenced Mr. Ilaşcu was to death and the other applicants to long term imprisonment (12 to 15 years). The political authorities of the Republic of Moldova considered this judgement as unlawful, and the Supreme Court of Moldova quashed it of its own motion, ordering the applicants' release. However, Moldova took no further remedial action.

Messrs. Ilaşcu and Leşcu were released in May 2001 and June 2004 respectively, whereas Messrs. Ivantov and Petrov-Popa remained detained in the 'MRT'.

[1] Art. 30 ECHR states that "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".
[2] See Update January-June 2001 of the *UNHCR Manual on Refugee Protection and the ECHR*, p. 5.

<u>*Complaint before the Court*</u>:

The applicants claimed that their detention had no legal basis, since it was decided by a *de facto* authority (**Article 5 ECHR**), that they were ill-treated by the 'MRT' authorities (**Article 2 and 3 ECHR**), that they did not have a fair trial (**Article 6 ECHR**), that their right to private life was violated (**Article 8 ECHR**), since they could not correspond freely while in detention, and that the confiscation of their property was illegal (**Article 5 ECHR**). The applicants lodged their claim both against the **Republic of Moldova** and **the Russian Federation, which they consider as the *de facto* authority in the MRT**.

<u>*Legal Argumentation:*</u>

Article 1 (State Jurisdiction)
The Court ruled that the applicants were under the jurisdiction of the Republic of Moldova within the meaning of Article 1 of the Convention and that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, was to be assessed in the light of its positive obligations under the Convention. Where a State is prevented from exercising its authority over the whole of its territory, it does not cease to have "jurisdiction". However, the factual situation reduces the scope of that jurisdiction, so that the State's undertaking under Article 1 had to be considered in the light of its positive obligations. These obligations, in the present case, related both to the measures needed to re-establish control over Transdniestria and to measures to ensure respect for the applicants' rights, including attempts to secure their release. The Court concluded that Moldova's responsibility is capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001. The declaration made by Moldova upon accession to the ECHR, stating that the territory of the 'MRT' would not fall under its jurisdiction because of the political situation prevailing there, was judged too general to be considered as a valid reservation in the sense of **Article 57** of the ECHR.

Concerning the jurisdiction of the Russian Federation, the Court concluded that, given the factual control evidenced by its military presence, and administrative and diplomatic acts, the Russian Federation held the effective authority over the 'MRT', or at the very least the decisive influence, and there was a continuous link of responsibility for the applicants' fate, since after ratification of the Convention no attempt had been made to put an end to their situation. The applicants therefore came within the jurisdiction of the Russian Federation and its responsibility was engaged.

The Court's jurisdiction ratione temporis

Article 2
The death sentence given by the Supreme Court of the 'MRT' to Mr. Ilaşcu had not been set aside when the respondent States ratified the Convention and the Court, therefore, had jurisdiction.

Articles 3, 5 and 8
While the events began in 1992 with the detention of the applicants, the Court had jurisdiction as they were still going on at the time of the ratification of the Convention.

Article 6
As the applicants' trial took place prior to ratification of the Convention, the Court did not have jurisdiction *ratione temporis* to examine their complaints of unfairness.

Article 2
The Court found that the judgment by the Moldovan Supreme Court in 1994 setting aside this death sentence had had no effect. However, as Mr. Ilaşcu was now living in Romania as a Romanian national, the Court considered that the risk of enforcement was more hypothetical than real and that it was more appropriate to examine his sufferings resulting from the sentence and the conditions of his detention under **Article 3 ECHR**.

Article 3
While the Convention binds Contracting States in respect of events subsequent to its entry into force, the Court took into consideration the whole period during which Mr. Ilaşcu had been detained under sentence of death, in order to assess the effect of his conditions, which remained essentially the same throughout that time. He had lived in constant fear of execution, unable to exercise any remedy, and his anguish was aggravated by the fact that the sentence had no legal basis or legitimacy in view of the patently arbitrary nature of the circumstances in which the applicants were tried. The detention conditions had a detrimental effect on Mr. Ilaşcu's health and he did not receive proper medical care or nutrition. In addition, the discretionary powers in relation to correspondence and visits were arbitrary and made the conditions of detention even harsher. The Court ruled that treatment to which Mr. Ilaşcu had been subjected amounted to **torture within the meaning of Article 3**. The Russian Federation was held responsible for that violation, whereas there had been no violation by Moldova as its responsibility was engaged only after Mr. Ilaşcu's detention.

The treatment of Mr. Andrei Ivanţoc and the conditions in which he had been kept, denied proper food and medical care, amounted to torture. As he remained in these conditions, the responsibility of both States was engaged as from the respective dates of ratification and their acts in **violation of Article 3 ECHR**.

The other two applicants had been kept in extremely harsh conditions which amounted to inhuman and degrading treatment and the responsibility of both States was engaged under **Article 3 ECHR**.

Article 5(1)(a)
The Court did not have jurisdiction to rule whether the proceedings against the applicants were in contravention to Article 6 ECHR. However, in so far as the applicants' detention continued after ratification by the respondent States, the Court had jurisdiction to determine whether they were lawfully detained after conviction by a competent court. Given the arbitrary nature of the proceedings, none of the applicants had been convicted by a "court" and the prison sentences imposed on them could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". This conduct was imputable to the Russian Federation in respect of all the applicants, and to Moldova in respect of Messrs. Leşcu, Ivanţoc and Petrov-Popa. The Court found a **violation of Article 5(1) (a) ECHR by the Russian Federation** in the case of all applicants and **by Moldova** in respect of the three mentioned applicants.

Article 8
The Court considered it not necessary to examine the complaints concerning correspondence and visits, as they had been taken into account in the context of Article 3.

Article 1 of Protocol No. 1
Even supposing the Court had jurisdiction *ratione temporis* to examine the applicants' complaint that their property had been confiscated following their trial, the Court found that this complaint had not been substantiated.

Article 34
The applicants claimed that they had not been able to apply to the Court and their wives had had to do it on their behalf. Moreover, they had been threatened and the conditions of their detention had deteriorated after their application was lodged. The Court held that such acts constituted an improper and unacceptable form of pressure which hindered exercise of the right of petition. In addition, the Russian Federation had apparently requested Moldova to withdraw certain observations submitted to the Court. The Court ruled that such conduct was capable of seriously hindering its examination of the application and held the **Russian Federation** responsible for **a violation of Article 34**. Furthermore, remarks by the Moldovan President that Mr Ilaşcu's refusal to withdraw his application after his release had been the cause of the remaining applicants' continued detention represented direct pressure intended to hinder exercise of the right of petition and amounted to a **breach of Article 34 by Moldova**.

Article 41
The Court awarded, in respect of pecuniary and non-pecuniary damage, 180,000 euros to the first applicant and 120,000 euros to each of the other applicants. It also awarded each applicant 7,000 euros in respect of the breach of Article 34. It further made an award in respect of costs and expenses.

♦ ***Slimani v. France*, Judgment of 27 July 2004, Appl. No. 57671/00**

- *Obligation of the State to carry out an"official and effective investigation" when a detainee dies in suspicious circumstances*
- *Access of a next-of-kin to an inquest determining the causes of the death in a detention centre*
- *Article 2 Right to Life*
- *Article 13 Right to an effective remedy*
- *Article 35(1) Exhaustion of domestic remedy*

Facts

The applicant, Dalila Slimani, is a French national living in Marseilles. Her partner, Mohsen Sliti, by whom she had two children, was a **Tunisian national**, who died in May 1999 while being held in a detention centre pending deportation.

Mr. Sliti had been permanently excluded from French territory in the context of a criminal conviction in 1990. He was finally held in the Marseille-Arenc Detention Centre for foreign nationals on 22 May 1999, pending deportation. Previously, he had been hospitalised on psychiatric grounds on several occasions and was under heavy medication. In the absence of medical services at the detention centre, medication was distributed by the police officers responsible for surveillance. On the fourth day of his detention, Mr. Sliti refused twice to take his medication. He collapsed the same day and, despite rapid emergency treatment administered by a doctor, who was then called to the Centre, died shortly after in a hospital.

An inquest to "establish the cause of death" was opened by the judicial authorities of their own motion on the same day, but the applicant was refused permission to take part in it. She failed in gaining access to the autopsy and toxicology reports, and was never interviewed by the investigating judge.

She requested the investigating judge and subsequently the president of the indictment division to send the investigation files to the public prosecutor for a supplementary

application to be made extending the investigation to include a count of manslaughter. Her request was declared inadmissible notably on the ground that "in the proceedings to investigate the causes of death, Ms Slimani does not have standing to request investigative measures".

The inquest established that Mr Sliti had died of cardiac arrest induced by acute pulmonary oedema after an epileptic attack that may have been brought on by his refusal to take his usual medication. It also concluded that the treatment administered at the detention centre by the Samu (Mobile Emergency Medical Service) and subsequently at the hospital was consistent with "current scientific knowledge". In June 2001 the public prosecutor decided to take no further action in the matter.

The applicant was not informed of the outcome of the inquest nor the decision to discontinue the proceedings. The position at the material time was that where an inquest was under way to "determine the causes of death", the deceased's next-of-kin could neither obtain access to the file nor take part in the proceedings.

Complaint before the Court:

The applicant held the **French authorities responsible for her partner's death (Article 2 ECHR)** and complained about his **detention conditions (Article 3 ECHR)**. She also complained that she had not been permitted to take part in and get access to the inquest into the cause of his death **(Article 2 ECHR)** and of the inadequate nature of that inquest **(Article 13 in conjunction with Article 2 or 3 ECHR)**.

Legal Argumentation:

Mr Sliti's death and the conditions in which he was detained

Article 13 in conjunction with Article 2 and 3
Article 35(1)
Concerning **Article 13 in conjunction with Article 2 and 3 ECHR**, the Court found that the applicant could have lodged a complaint for homicide with an investigating judge, along with an application to join the proceedings as a civil party. This domestic remedy was accessible, capable of providing redress in respect of the complaints and offered reasonable prospects of success. The Court concluded, therefore, that the applicant had not satisfied the obligation to exhaust domestic remedies as laid down by **Article 35(1) ECHR** and that, therefore, it could not consider the merits of the applicant's complaints alleging a substantive violation of Article 2 and 3 of the Convention. Given the close affinities between Article 13 and Article 35(1) of the Convention, the Court also concluded unanimously that there had **not been a violation of Article 13** taken together with Articles 2 or 3 of the Convention.

Conduct of the investigation

Article 2
The Court reiterated its jurisprudence that in any case in which a detainee dies in suspicious circumstances **Article 2 ECHR** requires the authorities to carry out of their own motion an "official and effective investigation" capable of establishing the causes of death and identifying and punishing those responsible. In addition there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. Although the degree of public scrutiny required may vary from case to case, the

next-of-kin of the victim must in all cases be involved in the procedure to the extent necessary to safeguard their legitimate interests.

Compliance with Article 2 of the Convention would have required permitting Ms Slimani to take part in the inquiry into the cause of Mr Sliti's death without having to lodge a criminal complaint beforehand. Since that did not happen, the Court found that the inquiry by the French authorities was not effective and held that there had been a **procedural violation of Article 2 ECHR**.

Article 3
The Court held that in view of that finding it was not necessary for it to examine whether the procedural requirements of Article 3 had been satisfied.

Article 41
The Court awarded the applicant 20,000 € for non-pecuniary damage and 15,000 € for costs and expenses.

This judgement has become **final**.

♦ ***Blecic v. Croatia*, Judgment of 29 July 2004, Appl. No. 59532/00**

- *Article 8 Right to respect for the home*
- *Article 1 of Protocol No. 1 Protection of property*
- *Termination of specially protected tenancy, margin of appreciation for the State*

The case was declared **admissible** on 30 January 2003.[3]

Facts:

The applicant, Krstina Blečić, is a **Croatian** national living in Zadar, Croatia, who acquired in 1953 a specially protected tenancy (*stanarsko pravo*) on a flat in Zadar.

On 26 July 1991, she went to stay with her daughter in Rome for the summer, locking her flat, with all the furniture and personal belongings in it, and asking a neighbour to pay the bills in her absence and to take care of the flat.

From 15 September 1991 onwards, the town of Zadar was exposed to constant shelling and the supply of electricity and water was disrupted for over 100 days. In October 1991 the applicant's pension was stopped and she lost the right to medical insurance. She therefore decided to stay in Rome. In November 1991, a certain M.F., with his wife and two children, broke into the applicant's flat in Zadar.

On 12 February 1992, the Zadar Municipality (*Općina Zadar*) brought a civil action against the applicant for termination of her tenancy, on the ground that she had been absent from the flat for more than six months without justification. The applicant argued that she had not been able to return to Zadar given the war in Croatia and because she had no money, no medical insurance and was in poor health. When she had enquired about her flat and her possessions, M.F. had also threatened her over the telephone.

[3] See Update No. 20 January-July 2003 of the *UNHCR Manual on refugee Protection and the ECHR*, p. 5.

The Croatian courts ultimately terminated the applicant's specially protected tenancy, finding that the reasons given by the applicant did not justify her absence, rejecting *inter alia*, the escalation of the armed conflict as a justification for leaving Zadar, since it affected every citizen of the town equally.

Complaint before the Court:

The applicant alleged, in particular, that her rights to respect for her home and to the peaceful enjoyment of her possessions had been violated relying on **Article 8 (right to respect for home) ECHR and Article 1 of Protocol No. 1 (protection of property)**. Additionally, she claimed a violation of her property rights because she had been deprived of the possibility of buying the flat in question.

Legal Argumentation:

Article 8

"In accordance with the law" and legitimate aim
The Court ruled that the termination of her tenancy was in accordance with the law, being based on section 99(1) of the Housing Act, which aims at the prevention of abuse of tenancy rights. The legislation pursued a **legitimate aim, the satisfaction of housing needs**, and was thus intended to promote the economic well-being of the country and the protection of the rights of others.

"Necessary in a democratic society"
The Court observed that **in socio-economic matters such as housing a wide margin of appreciation is available to the State** in balancing conflicting interests in the society. Therefore, the Court would accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment was manifestly without reasonable foundation, that is, unless the measure employed was manifestly disproportionate to the legitimate aim pursued.

The Court noted that the Croatian courts had duly considered the relevant factual and legal questions and provided a careful analysis of the arguments put forward by the applicant. The Croatian courts' decisions were neither arbitrary nor unreasonable. Their balance struck between the general interest of the community and the applicant's right to respect for her home was not manifestly disproportionate to the legitimate aim pursued. When terminating the applicant's specially protected tenancy, the national authorities acted within the margin of appreciation afforded to them in such matters. Even if **alternative solutions** might have been available to the authorities, for instance, the mere temporary allocation of the flat to another person, this did not *per se* render the termination of the tenancy unjustified[4]. As long as the State exercised its **discretion** in a reasonable way and suited to achieve the legitimate aim, it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem.

In terms of procedural **fairness**, the applicant had been sufficiently involved in the decision-making process to provide her with the requisite protection of her interests.

The Court held, unanimously, that there had been **no violation of Article 8 ECHR**.

[4] OSCE, which intervened as a third party in the case, argued that alternative measures could have been taken (See para 44-48 of the judgment), e.g. the Croatian government could have declared the tenancy right-holders' flats temporarily abandoned, allocating them to displaced persons for temporary use.

Article 1 of Protocol No. 1
The Court did not find it necessary to decide whether or not a specially protected tenancy constituted property or a possession. Even assuming that the termination of the applicant's tenancy involved a right to property, the Court considered that the interference in question was neither an expropriation nor a measure to control the use of property. The Court recalled that it had already found in its consideration of the complaint raised under Article 8 that the termination of the applicant's tenancy pursued a legitimate social policy aim and struck a fair balance between the interests involved.

The Court, therefore, held, unanimously, that the termination of the tenancy and the resultant loss of an eventual opportunity to purchase the flat in question did **not amount to a violation of Article 1 of Protocol No. 1 to the ECHR.**

On **22 December 2004**, the Grand Chamber panel of five judges has accepted at the applicant's request the case for **referral to the Grand Chamber** in accordance with Article 43(1)[5] ECHR.

♦ ***Melnychenko v. Ukraine*, Judgment of 19 October 2004, Appl. No. 17707/02**

- *Article 3 of Protocol No. 1 to the ECHR - right to free elections*
- *Residency requirement for parliamentary candidates*

Facts:
The applicant is a **Ukrainian** national, who worked in the Department of Security of the President of Ukraine. In the course of his duties he allegedly tape-recorded conversations of the President which revealed the possible involvement of the latter in the disappearance of the well-known political journalist, Mr. Gongadze[6]. When the tape recordings were publicly disclosed, the applicant left Ukraine for fear of political persecution and was granted **refugee status** in the United States. The General Prosecutor's Office instituted criminal proceedings against the applicant on charges of defamation of the President, forgery, disclosure of State secrets and abuse of power. A warrant for his arrest and detention pending trial was issued by the District Court. The facts which gave rise to the applicant's complaints were related to his subsequent nomination by the Socialist Party as a candidate for the *Verkhovna Rada* (Parliament). The Central Electoral Commission (CEC) rejected his registration given that he had not resided in the country for the last five years, as required by electoral legislation, and had submitted untrue data regarding his place of residence in the registration documents. When fleeing to the United States the applicant had kept his internal passport (*propiska*), a document which stated that he was *formally* a resident in Ukraine, and had used it for his electoral registration request. He appealed to the Supreme Court against the refusal of his registration, but the complaint was dismissed on the same grounds as those given by the CEC.

Complaint:
The applicant complained that he was arbitrarily denied registration on the Socialist Party of Ukraine's list of candidates for the parliamentary election in violation *inter alia* of **Article 3**

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[5] Art. 43(1) of the ECHR provides that "within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber".

[6] The application lodged by Mr. Gongadze's widow was declared admissible by the Court on 22 March 2005 (*Gongadze v. Ukraine*, Decision of 22 March 2005, Appl. No. 34056/02).

of Protocol No. 1 (right to free elections). The applicant alleged that although the Ukrainian Law on elections was compatible with Article 3 of Protocol No. 1, its interpretation by the domestic authorities had no objective or reasonable justification.

Legal Argumentation:
While stating that Article 3 of Protocol No. 1 enshrined a fundamental principle for effective democracy, the Court recalled that the **subjective rights to vote and to stand for election deriving from this provision were not absolute** and that the Member State had a wide margin of appreciation in this sphere. The Court had never expressed its opinion on the specific question of a residency requirement in relation to the right to stand for elections, but accepted that strict conditions on eligibility to stand for parliamentary elections could be justified. Thus, the imposition of a five-year continuous residency requirement for parliamentary candidates could not be precluded outright. However, in the instant case, the Court found that domestic legislation and practice did not contain an explicit requirement of "continuous" residence in Ukraine and relied only on the internal passport of a person as a proof of legal registration, which did not always correspond to that person's habitual place of residence. Parliamentary candidates were only under the obligation to provide information based on their internal passport (*propiska*). The Court stressed that the applicant had left Ukraine for an objective fear of persecution and was in a difficult situation: had he stayed, his physical integrity might have been endangered and rendered the exercise of his political rights impossible, whereas in leaving he was also prevented from exercising such rights.

The Court therefore found that the decision to refuse the applicant's candidacy on the ground that he had submitted untrue information about his place of residence and that he was not resident in the Ukraine over the full five years, although he retained a valid registered place of legal residence in Ukraine (as denoted in his propiska), was in **violation of Article 3 of Protocol No. 1**[7].

In accordance with Article 41 ECHR, the Court awarded the applicant 5,000 euros for non-pecuniary damage.

2. Court Decisions

A. Cases declared admissible

♦ ***Said v. the Netherlands*, Decision of 5 October 2004, Appl. No. 2345/02**

The applicant is an **Eritrean** national who arrived in the Netherlands in 2001 and applied for **asylum**. He claims that in 1998, during the war between Eritrea and Ethiopia, he was called up in the army. After the war had ended in 2000, the troops were not demobilised and he continued in service. During a meeting of the applicant's battalion, he voiced criticism of the higher echelons of the army. A few months later, when he had forgotten about the event, he was allegedly detained in an underground cell for five months for having incited other

[7] In a dissenting opinion, the judge Loucaides considered that the national authorities, in deciding whether or not the relevant qualifications for parliamentary elections had been complied with in the applicant's case, chose to rely on his undisputed **actual residence** rather than on the **formal registration** of such residence and concluded that his reliance on the formal rather than the real residence was an untruthful statement which justified his disqualification. Consequently the judge Loucaides found that the decision of the Ukrainian authorities was not arbitrary and did **not violate Art. 3 of Protocol No. 1**.

soldiers during that meeting. He claims to have managed to escape from the army in 2001, and arrived in the Netherlands via Sudan and Belgium. His **asylum application was rejected** by the Deputy Minister of Justice, who found that his account lacked credibility. The Regional Court dismissed the applicant's appeal and request for further investigation. It considered it unlikely that the army was still in mobilization at the time the applicant claimed to have fled, and did not consider it necessary to hear an applicant's witness. The applicant lodged a further appeal to the Council of State, which he subsequently withdrew. Several country reports on Eritrea (including by the Dutch authorities and Amnesty International) indicate that persons caught for deserting or protesting against the military services are frequently tortured and arbitrarily detained.

The applicant complained under **Article 2 and 3 ECHR** that his expulsion to Eritrea would expose him to a real risk of death, torture or inhuman or degrading treatment.

The Court considered that the complaint raised by the applicant under Article 2 was closely linked to the substance of his complaint under Article 3 in respect of the consequences of a deportation for his life, health and welfare and found more appropriate to deal globally with his allegation when examining the complaint under Article 3. The Court dismissed the government's objection that the applicant had failed to exhaust domestic remedies and considered that no reproach could be made of the applicant for having withdrawn his appeal to the State Council, given that it stood no prospects of success. The Court unanimously found the application **admissible under Article 2 and 3 ECHR**.

- ***Bekos and Koutropoulous v. Greece*, Decision of 23 November 2004, Appl. No. 15250/02**

The applicants, who are ethnic **Roma**, were arrested by the police when attempting to break into a kiosk. The first applicant complains that he was repeatedly hit on the back with a truncheon, slapped and punched, both at the moment of detention and when being interviewed at the police station. The second applicant maintains that he was also abused physically and verbally throughout his interrogation. The Government dispute these facts. The day after their release, a forensic doctor issued a medical certificate stating that the applicants had "moderate bodily injuries caused in the past twenty-four hours by a heavy blunt instrument". The applicants have produced to the Court pictures taken on the day of their release showing their injuries. As a result of publicity which the incident received in the media, the Ministry of Public Order launched an administrative inquiry. The inquiry found that the officers who had arrested the applicants had acted "lawfully and appropriately", whilst two others had treated them with "particular cruelty during their detention". The report recommended the temporary suspension from service of these two officers, but this never took place. The applicants subsequently instituted criminal proceedings against the police officers. An official inquiry into the incident was ordered, and one of the police officers was committed for trial on account of physical abuse during the interrogation. The Court of Appeal concluded there was no evidence implicating the accused officer in any abuse and found him not guilty. The applicants, who had joined the proceedings as civil parties, were precluded under domestic law from appealing against this decision.

The applicants complained under **Article 3 ECHR** that during their arrest and subsequent detention they were subjected to acts of police brutality which amounted to torture, inhuman and/or degrading treatment or punishment. They also complain under the same provision in conjuction with Art 13 ECHR that the Greek authorities' investigation was flawed and that

they have obtained no effective domestic remedy for the harm suffered while in police custody.

The applicants further complained under **Article 14 ECHR** in conjunction with **Articles 3 and 13** that the ill-treatment they have suffered, along with the subsequent lack of an effective investigation into the incident, was in part due to their Roma ethnic origin. They submitted that the discriminatory motive for their abuse is clear and evidenced by (a) the nature of the incident, (b) the explicitly and implicitly racist language used by the officers at issue, and (c) the continuing failure of the Greek authorities to condemn and sanction instances of discrimination and anti-Roma police brutality, as documented by numerous international and domestic monitoring organisations.

The Court considered, in the light of the parties' submissions, that the application was **admissible** under **Articles 3, 13 and 14 ECHR.**

B. Cases declared inadmissible

♦ *Najafi v. Sweden*, Decision of 6 July 2004, Appl. No. 28570/03

The applicant, who is an **Iranian** national, entered Sweden for the first time in 1977. He unsuccessfully applied for a residence permit on several occasions. During the following ten years he spent most of his time in Iran but also resided in Sweden at intervals (with a temporary residence permit for two periods but at other times illegally). The applicant married a Swedish citizen in 1984, and on that basis was granted a permanent residence permit in 1988. They had two son and subsequently divorced. In 1997, the applicant was convicted of an aggravated narcotics offence following earlier convictions for three other criminal offences. He was sentenced to ten years' imprisonment and expulsion from Sweden with a life-long ban on returning there. The Court of Appeal upheld the judgment and leave to appeal to the Supreme Court was refused. Whilst the applicant was serving the prison sentence, his children visited him on 36 occasions. The applicant filed several petitions for the revocation of the expulsion order, claiming it would be detrimental to his children, the youngest of whom was already experiencing psychological difficulties. He was nevertheless **deported to Iran in February 2004**.

The applicant complained under **Article 8 ECHR** (right to respect for private and family life) about his expulsion.

The Court ruled that, despite the fact that expulsion would have serious implications for the applicant's family life, such implications had to be balanced against other relevant interests, namely public safety and the prevention of disorder and crime. Since the applicant had been convicted of an aggravated narcotics offence, and prior to that of three other criminal offences, the Swedish authorities had not failed, within their margin of appreciation, to strike a fair balance, and the expulsion order had thus been justified. The Court ruled that the application was manifestly ill-founded and thus **inadmissible under Article 8 ECHR**.

♦ ***Dragan and others v. Germany,*** **Decision of 7 October 2004, Appl. No. 33743/03**

The applicants, a mother and her children, were living in Germany **without a residence permit**. They had renounced their original Romanian nationality with the consent of the Romanian authorities. As **stateless** persons, they could not at first be sent back to their country of origin. This obstacle was subsequently removed following an agreement between Germany and Romania by which Romania undertook to accept its former nationals who had renounced their citizenship. The German authorities ordered the applicants to leave German territory and announced their deportation. The applicants appealed unsuccessfully. The first applicant suffered from physical and psychological illness. In particular, she was diagnosed as suffering from hepatitis C and severe depression. The social services considered her threat to commit suicide if she were obliged to leave Germany credible. In September 2003, the competent medical service stated that the first applicant was capable of supporting the journey in the event of deportation, as long as continuous medical assistance was provided to prevent any act of self-mutilation or suicide. However, they unreservedly advised against such a journey. The applicant's children, who had been living in Germany for more than ten years, argued that their presence alongside their mother was essential, given her state of health and her suicide threats; they also asked to be able to complete their education in Germany. The authorities granted them extensions of leave to remain for that purpose, subject to certain conditions. In June 2004 the authorities instructed the applicants to leave Germany but, taking the first applicant's suicide threats seriously, decided, as a precautionary measure, not to inform the applicants of the date of their deportation. It was also decided that the applicant would undergo a medical examination before her departure and that she would be provided with medical support until her arrival in Romania. Following the Court's request under Rule 39 of its Rules to suspend provisionally the applicants' deportation to Romania in September 2004, the authorities stated that the deportation was not imminent. The applicants lodged appeals against the expulsion orders, without success.

The first applicant alleged inability to support the transfer to Romania and the risk of suicide in the event of deportation under **Article 3 of the ECHR**.

The Court found that the fact that a person whose deportation had been ordered threatened to commit suicide did not require the Contracting State to abstain from enforcing the envisaged measure, provided that they took specific steps to prevent those threats being realised. In this present case, none of the evidence submitted to the Court indicated that the authorities would not take the necessary precautions which were incumbent on them under the ECHR. Therefore the Court judged the application in this respect **inadmissible under Article 3 of the ECHR.**

The first applicant also argued that the impossibility of ensuring appropriate treatment for her health problems in Romania amounted to **ill-treatment prohibited under Article 3**. Backed up by a letter from a doctor trusted by their embassy in Bucharest, the German Government argued that the applicant's physical and psychological illnesses could be treated in Romania, and that the treatment for hepatitis which she received in Germany, using expensive medication, was not essential to control the disease. The Romanian Government – which submitted a third-party intervention – confirmed that the applicants could receive appropriate care in Romania and that they would enjoy the same statutory welfare conditions as Romanian citizens, even if they sought to maintain their status as stateless persons, provided that they established their residence in Romania. Accordingly, the Court found that the applicants had not proved that their illnesses could not be treated in Romania. The fact that the situation with regard to the first applicant's health care provision would be less favourable

in Romania than in Germany was not decisive from the perspective of Article 3. Admittedly, the applicant's health was a matter of concern. Having regard, however, to the high threshold set by Article 3, particularly where the case did not concern the Contracting State's direct responsibility for the infliction of harm, in the absence of exceptional circumstances, the Court did not find that there was a sufficiently real risk that the applicants' removal to Romania - a Contracting State to the Convention - would be incompatible with Article 3. The Court found the application in this respect **manifestly ill-founded**.

The Court considered that the applicants' deportation did not constitute a lack of respect for their family life within the meaning of **Article 8(1)**. The fact that the applicants refused to return to Romania and sought to remain in Germany could not be considered relevant in that respect. The Court found the application **manifestly ill-founded under Article 8** of the ECHR.

- ***Ward v. the United Kingdom*, Decision of 9 November 2004, Appl. No. 31888/03**

The applicant is a **traveller**, who has been living on an official gypsy site with his family since 1972. Given the site's location close to a motorway bridge and a railway line, the applicant has for a long time been campaigning for its relocation. In 1992 he obtained a report from Health Officers, which indicated that the conditions at the site were unsatisfactory and prejudicial to health. In 2002, another report confirmed that the site was not a suitable location for a gypsy site because of the levels of noise and pollution. Following the coming into force of the Human Rights Act 1998, the applicant renewed a request for relocation of the site, invoking arguments under the ECHR. The authorities responded that they were under no duty to provide a new site and that no valid claims arose under the Convention. Moreover, refurbishment of the site was envisaged. Judicial review proceedings were refused.

The applicant complains under **Article 3 and 8** of the ECHR of the noise and pollution conditions at the caravan site and the inadequate response of the authorities, local and judicial, to the situation.

In the absence of any evidence concerning the effect on health, physical or mental, of occupation of the site, the Court found that the **conditions at the caravan site do not reach the threshold of Article 3 of the ECHR** and that the application was **manifestly unfounded**.

Under **Article 8**, the Court noted that the applicant had moved into the site voluntarily and that he had not shown any efforts to find another official gypsy site, where vacancies arose periodically. As there were no exceptional circumstances, the Court recalled that no right can be derived from Article 8 that authorities provide alternative housing, or conditions for housing, that meet particular environmental standards or in any particular location. Moreover, the authorities had taken measures to improve the situation at the site. In such circumstances, the Court ruled that there had been **no interference with the applicant's right to respect for home or private life** and considered the application manifestly ill-founded under Article 8 of the ECHR. For these reasons the application was declared **inadmissible**.

♦ ***Amegnigan v. the Netherlands*, Decision of 25 November 2004, Appl. No. 25629/04**

The applicant, who is a **Togolese** national, arrived in the Netherlands in September 2000 and unsuccessfully applied for **asylum**. He was subsequently diagnosed as being infected with HIV and provided with antiretroviral treatment. His second and third asylum applications, which relied on his health problems and were supported by a medical opinion, were also rejected. In October 2003, the Minister for Immigration and Integration found that his illness had not reached a life-threatening stage, which would render his expulsion contrary to Article 3 ECHR. Moreover, the applicant's reasons for leaving Togo had not been linked to his health problems and he could have applied for a temporary residence permit on medical grounds. The Council of State confirmed this decision.

The applicant complained under **Article 3 ECHR** that his expulsion to Togo, on account of the difficulty of obtaining medical treatment there, would accelerate the course of his HIV infection and considerably reduce his life expectancy.

The Court found that, despite the seriousness of the applicant's medical condition, there were no indications of an advanced stage of AIDS or an HIV-related illness. As treatment was in principle available in Togo, albeit at a possibly considerable cost, and bearing in mind that the applicant had some family support in his home country, the circumstances of his situation were **not** of such an **exceptional nature** as to render his expulsion **a treatment prohibited by Article 3**. For these reasons, the Court declared the application **inadmissible**. This case demonstrates the caution the Court uses in applying the *D v. United Kingdom* jurisprudence, which was based on **"very exceptional circumstances"**[8].

C. Cases adjourned

No cases relevant to the international protection of refugees.

D. Cases struck off the list

No cases relevant to the international protection of refugees.

E. Friendly settlements

♦ ***Kostić v. Croatia*, Judgment of 18 November 2004, Appl. No. 69265/01**

The applicant is a **Croatian** national, who owns a house in Petrinja. He left Croatia in August 1995 due to military actions in that area. On 24 March 1997, the applicant's house was given to a couple of Petrinja residents for temporary use because their house was destroyed during the war. Despite the eviction judgment of the Petrinja Municipal Court issued on 10 June 1998 and the eviction order issued on 7 December 1998, the applicant only obtained re-possession of his house on 12 November 2001.

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[8] See *UNHCR Manual on refugee Protection and the ECHR*, Part 4.1 – Selected Case Law on Article 3, p. 8.

The applicant complained that the prolonged period (more than 3 years) for which he had been unable to regain possession of his house, violated his right to peaceful enjoyment of his possession guaranteed under Article 1 of Protocol No. 1. The applicant further complained under Article 14 of the ECHR that he was discriminated against on the basis of his Serbian origin.

The Government argued that it had the right to control the use of property in pursuit of public interest through the Programme for Return of Refugees and Displaced Persons adopted in 1998, namely to secure re-possession of property to persons who had left Croatia and whose property had been given for temporary use to other persons but at the same time to protect refugees who were placed in houses owned by the previous group of persons. Due to the shortage of state-owned accommodation in the Petrinja area, the government further argued that it failed to find an alternative accommodation for the family temporarily placed in the applicant's house and was not able immediately to secure to the applicant the re-possession of his property.

The Court dismissed the government's argument and considered that, although the applicant had regained the possession of his house, he could still be considered as a victim of a **violation of Article 1 of Protocol No. 1 given the long period of deprivation of his possession**.

The Court noted that the Programme for Return equally applied to all persons who returned to Croatia irrespective of their ethnic origin[9] and that there was no indication that the applicant was discriminated against in any respect. The Court concluded that the application was **inadmissible under Article 14 ECHR**.

In view of the above, the Court declared the application **partly admissible** on 8 January 2004.

Following the offer by the Croatian Government to pay *ex gratia* EUR 11,000 to the applicant to secure a friendly settlement, the latter waived any further claims against Croatia in respect of the facts of his application. This sum covers any pecuniary and non-pecuniary damage as well as costs and expenses. The Court noted the agreement reached by the parties and struck the case off the list.

F. Applications communicated to governments

♦ *Utsayeva and others v. Russia*, Appl. No. 29133/03

The eight applicants are the relatives of five men, who were allegedly detained in June 2002 in their homes in **Chechnya**. The applicants claim, supported by numerous affidavits from family members and neighbours, that heavily armed soldiers in uniform entered their homes shouting and using force, and took their relatives away. They also claim that they themselves were beaten and ill-treated during the operation. In the absence of any news from their relatives, they maintain that this gives rise to a strong fear of an extrajudicial execution by Russian soldiers. After the detention of their relatives, the applicants actively searched for them and applied to different official bodies and prosecutors requesting an investigation. They received very little substantive information on the steps taken to find their relatives and the case-files were transferred back and forth between the District Prosecutor's Office and the

[9] The Croatian government submitted that the parties to the proceedings are not asked to declare their ethnic origin and that between 1998 and 2002 there had been 15 proceedings carried out by persons of Serbian origin which had led so far to six owners re-possessing their houses.

military prosecutors. The applicants are uncertain whether the criminal proceedings into the disappearances have been suspended or are ongoing. Following their application to the Court, some of the applicants complained that they have been harassed and beaten at their homes and that a number of their personal items have been confiscated, including a copy of the application to the Court.

These applications have been **communicated to the Government under Articles 2 (right to life), 3 (Prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 34 (individual application) ECHR.**

♦ ***Matsiukhina and Matsiukhin v. Sweden*, Appl. No. 31260/04, Decision of 14 September 2004**

The applicants are a married couple from **Belarus** who entered **Sweden** in May 2002 and applied for **asylum**. The wife, who had worked for a youth organisation closely connected to the President, allegedly discovered that the organisation was engaging in **illegal economic activities**, including money laundering. She brought the matter to the attention of the highest police authority in Belarus, but maintains that the investigation was soon discontinued. She claims to have subsequently revealed details of the youth organisation's activities in public meetings and as a result to have been dismissed from her job, received threats and been assaulted. She also claims that she was requested by the authorities not to leave the country and that her passport was thereafter illegally confiscated. Her husband claims that, after his wife's denunciation of the organisation's illegal activities, he had to close down his business. Their **asylum applications were rejected** by the Swedish Migration Board, which ordered their expulsion. Whilst acknowledging the difficult political situation and authoritarian regime in Belarus, the Board considered that the **general conditions in the country did not constitute a ground for asylum**. Moreover, the applicant had not kept copies of the documents which proved the alleged illegal activities within the State organs, and the medical certificates submitted did not show she had sustained serious injuries.

The applicants complain that they will risk treatment contrary to **Article 3 ECHR** upon return to Belarus. They further maintain under **Article 6 ECHR** that they did not have a fair hearing as certain documents were not translated by the Swedish authorities and as they were not given an oral hearing.
While the Court **communicated the application to the Government under Article 3 ECHR**, it recalled that **Article 6** is not applicable to proceedings concerning the entry, stay and deportation of aliens[10] and considered the application **inadmissible** under this provision.

♦ ***Dritsas and others v. Italy*, Appl. No. 2344/02**

The applicants are **Greek** nationals, who travelled by ship to Italy with about a thousand compatriots to attend a G8 "counter-summit". The Italian customs police checked the travellers' passports and authorised them to enter Italian territory. The applicants then left in coaches for the place where the summit was being held. Three of the eighteen hired coaches were forced to turn back by the police. The police officers allegedly ordered the passengers to re-board the ship. When the passengers refused to comply, the police, assisted by Special

[10] See Maaouia v. France, Appl. No. 39652/98, Judgment of 5 October 2000. Update No. 15 August – December 2000 of the *UNHCR Manual on Refugee Protection and the ECHR*, p. 1.

Forces, surrounded them for four hours, and obliged them thereafter to re-embark by striking them and dragging them along the ground. The applicants allege that many people were wounded and sustained pecuniary damage.

The application was **communicated to the Government under Articles 3 (prohibition of torture), 5(1) (right to liberty and security), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy), 14 (prohibition of discrimination), 16 (restrictions on political activity of aliens) ECHR, and Articles 1 of Protocol No. 1 (protection of property) and 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the ECHR.**

G. Rule 39 of the Rules of the Court – Interim measures

♦ ***Keljmendi v. Former Yugoslav Republic of Macedonia*, Appl. No. 44922/04**

On 17 December 2004, the Court received a request for interim measures from an **Ashkaelia** family originating from **Kosovo**, who feared ill-treatment upon return from the Former Yugoslav Republic of Macedonia (FYROM). After enjoying **asylum** in **Germany** from 1993 to 2003, the Keljemdi family was expelled to Kosovo, where they were allegedly subjected to ethnically motivated violence. On 1 July 2004 they fled to **FYROM**, where their **asylum claim was rejected**. The applicants allegedly fear a real risk of being subjected to ill-treatment **in violation of Article 2 and 3 of the ECHR if returned to Kosovo**. They also allege that the FYROM authorities' failure to assess their protection needs under Article 3 ECHR in the accelerated asylum procedures infringed their right to have access to an effective remedy and complained about a **violation of Article 13 in conjunction of Article 3 ECHR.**

The Court's Registry submitted a complementary questionnaire and authorization forms to be signed by the applicants. The Chamber in charge of the case decided to apply **interim measures until March 2005** pending further information and requested the FYROM government not to expel the applicants.

3. Supervision of execution of Judgements by the Committee of Ministers

Nothing to report in relation to the international protection of refugees.

4. Other news

On **6 October 2004**, the Parliamentary Assembly of the Council of Europe elected **Mr. Jan Šikuta** as the new judge of the European Court of Human Rights with respect to **Slovakia**. Mr. Šikuta served a Legal Officer at the UNHCR Office in Bratislava Since 1994. His new term of office of six years as a judge to the Court began on 1 November 2004.

On **11 October 2004**, the European Court of Human Rights re-elected its President, **Mr. Luzius Wildhaber** (Switzerland) for a third three-year term beginning on 1 November 2004.

As of 30 March 2005, **Protocol No. 1 to the ECHR**, which aims at securing the long-term effectiveness of the Court[11], had been **signed by 32** and **ratified by seven** Council of Europe Member States.

UNHCR
30 March 2005

[11] For further detail concerning Protocol No. 14 see Update No. 22 January – June 2004 of the *UNHCR Manual on Refugee Protection and the ECHR*, pp. 17-19.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.9 – Summaries of Judgments and Admissibility Decisions (January – June 2005)

1. Court Judgments

♦ *Singh v. Czech Republic*, Final Judgment of 25 January 2005, Appl. No. 60538/00

- *Protection against arbitrary detention pending deportation, obligations of the State in terms of due diligence and speedy decisions*
- *Violation of Article 5 § 1 f and § 4 ECHR (right to liberty and security)*

Facts:
The applicants, Balbir Singh and Bakhschisch Singh, are **Indian nationals**. Following their arrest on 11 November 1996 in the Czech Republic, where they lawfully resided, they were sentenced on 9 April 1998 to 21 months' imprisonment for abetting the illegal crossing of the border by third persons and permanently banned from the Czech territory. After serving their sentence, they were placed in detention on 11 August 1998 with a view to their deportation, on the ground that they did not have passports allowing for their immediate deportation. Several appeals against the detention decision as well as requests for refugee status remained unsuccessful in all instances. Throughout the detention, the proceedings of the Chzech authorities where marked by delays between various administrative steps and periods of inaction.

On 6 February 2001, the Constitutional Court found any further prolongation of the detention to be permissible only in exceptional circumstances, which did not apply in this case. Following their release on 11 February 2001, the police issued travel documents to the applicants, permitting them to leave the country.

After the expiry of a temporary visa, the first applicant left the country to reside in Slovakia.

The second applicant remained in the Czech Republic with a renewed visa and applied a second time for asylum, without success to date. His appeal at the Supreme Administrative Court is still pending.

Demarches by the Czech authorities to obtain travel documents for the applicants:
Between June 1998 and February 2001, the Czech authorities repeatedly requested the Indian Embassy with success to provide the applicants with passports. It does not appear from the judgment, whether, after February 2001, passports where finally supplied by the Embassy.

Complaint before the Court:
The applicants claimed that the duration of the detention with a view to deportation had been excessive owing to the lack of due diligence of the Czech authorities in handling their case. They disputed the alleged risk of failure of the deportation, brought forward by the Czech authorities and courts to justify the repeated prolongation of the detention and submitted that the detention in general had been disproportionate **(Article 5 § 1 f ECHR)**. The applicants

complained that the courts did not make speedy decisions on their requests to lift the detention (**Article 5 § 4 ECHR**).

Legal Argumentation:
Article 5 § 1 f) ECHR
The Court recalled that, given the aim of Article 5 to protect the individual against arbitrary detention, it is the implementation of the deportation procedure, which justifies detention under Article 5 § 1 f). Detention in view of deportation can, therefore, only be justified as long as this procedure is conducted with due diligence. In the present case, the detention lasted two and a half years with inactive periods, such as the time intervals between several police requests and diplomatic notes addressed to the Indian Embassy. The Court found that the Czech authorities should have displayed more activity, particularly after the Indian Embassy stated its unwillingness to supply the applicants with passports in April 1999. For this reason and, *inter alia*, the failure of the Czech courts to put forward serious reasons for prolonging the detention beyond two years as required by the Czech law, the Court found that the procedure was not conducted with due diligence. The prolonged detention constituted, therefore, a **violation of Article 5 § 1 f ECHR**.

Article 5 § 4 ECHR
The Court jurisprudence holds that any periodical judicial control of a detention needs to respect national law and be in conformity with the aim of Article 5, the protection of the individual against arbitrary detention. Regardless of the national system of judicial control, under Article 5 § 4 the Contracting States need to ensure a speedy decision on the legality of a detention. Given the length of the proceedings as well as several delays in the notification of the applicants on decisions, which deprived them in one case of their right to lodge a new request to lift the detention, the Court found a **violation of Article 5 § 4 ECHR**.

♦ ***Mamatkulov and Askarov v. Turkey*, Final Judgment of 4 February 2005, Appl. No. 46827/99 and 46951/99, Grand Chamber**

- ***Failure of the State to comply with an interim measures indicated under Rule 39 of the Rules of Court constitutes a violation of Article 34 - in departure of the Courts own precedents, according to which interim measures were non-binding***[1]
- *No violation of Article 2 (right to life)*
- *No violation of Article 3 (prohibition of torture)*
- *No violation of Article 6 §1 (right to a fair trial)*
- *Violation of Article 34 (effective exercise of right of individual application)*

Facts:
The two applicants are **Uzbek nationals** and members of an opposition party in Uzbekistan. The Turkish police arrested them early March 1999 under international arrest warrants on suspicion of having committed terrorist acts in their country of origin. Under a bilateral treaty, Uzbekistan requested their extradition from Turkey. The applicants lodged an appeal with the Court, claiming, *inter alia*, that they risked ill-treatment upon extradition. Despite Rule 39 interim measures indicated by the Court on 18 March 1999, the Turkish authorities extradited the applicants to Uzbekistan on 27 March 1999, subsequently informing the Court that they had received assurances that the applicants would not be tortured or sentenced to capital punishment in Uzbekistan. The applicants were convicted in June 1999 by the High Court of

[1] *Cruz Varas and Others v. Sweden*, 20 March 1991, 15576/89; *Čonka and Others v. Belgium*, 13 March 2001, 51564/99.

the Republic of Uzbekistan and sentenced to twenty and eleven years' imprisonment respectively. Following the applicants' extradition, their representatives were unable to contact them further.

Complaint before the Court:
The applicants complained that their extradition to the Republic of Uzbekistan was in breach of **Articles 2 and 3 ECHR**, claiming that, at the time of extradition, they faced a real risk of torture or ill-treatment. The applicants further complained under **Article 6 § 1 ECHR** of unfairness in the extradition proceedings in Turkey and the criminal proceedings in Uzbekistan. Finally, the applicants argued that, by carrying out the extradition despite the measure indicated by the Court under Rule 39 of the Rules of Court, Turkey had failed to comply with its obligations under **Article 34 ECHR**.

Submission by the Government:
The Government observed, *inter alia*, that the extradition followed diplomatic assurances given by Uzbekistan not to impose the death penalty and to ensure that the applicants would not be subjected to torture or ill-treatment or be generally liable to confiscation of their property. The Uzbek authorities had given an assurance that the Republic of Uzbekistan, as a party to the United Nation's Convention against Torture, accepted and reaffirmed its obligation to comply with the requirements of that Convention.
Concerning the effects of the interim measures indicated under Rule 39, the Government referred to the jurisprudence[2] of the Court for the proposition that the Contracting States had no legal obligation to comply with such indications.

Third party intervention:
The International Commission of Jurists submitted that in the light of the general principles of international law, the law of treaties and international case law, interim measures indicated under Rule 39 of the Rules of Court were binding on the State concerned.

Legal Argumentation:
Articles 2 and 3
Based on the evidence before the Court, no violation of Articles 2 and 3 ECHR could be found.[3] However, Turkey's failure to comply with the interim measure indicated under Rule 39 had to be examined under **Article 34 ECHR**, as the extradition had denied the applicants the opportunity to supply the evidence required by the Court to assess whether a "real risk" existed in the manner it considered appropriate in the circumstances of the case.

Article 6 § 1
Concerning the **extradition proceedings in Turkey**, the Court reiterated its position that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention.[4]

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[2] *Ibid*.
[3] Please note the partly dissenting opinion of Judges Bratza, Bonello and Hedigan: Based on the available circumstantial evidence, substantial grounds had been shown for believing that the applicants faced a real risk of ill-treatment and that, in returning the applicants despite this risk, Article 3 of the Convention has been violated.
[4] *Maaouia v. France* [GC], 5 October 2000, 39652/98, § 40; *Penafiel Salgado v. Spain*, 16 April 2002, 65964/01; *Sardinas Albo v. Italy*, 8 January 2004, 56271/00.

Concerning the **criminal proceedings in Uzbekistan**, the Court referred to its judgment in *Soering v. UK*[5], where it had said: *"The right to a fair trial in criminal proceedings, as embodied in Article 6 holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."* The Court acknowledged that there "*may have been reasons for doubting at the time" that the applicants would receive a fair trial in Uzbekistan"* but concluded that there was insufficient evidence to show that any possible irregularities in the trial were liable to constitute a "flagrant denial of justice" within the meaning of the Court's *Soering* judgment.[6] However, Turkey's failure to respect the interim measure under Rule 39 prevented the Court from obtaining additional information to facilitate its assessment of whether there was a real risk of a flagrant denial of justice and had, therefore, to be examined in the light of **Article 34 ECHR.**

Article 34
Turkey's failure to comply with the interim measures indicated by the Court raised the issue of whether Turkey was in breach of its obligation under Article 34 ECHR, i.e., not to hinder the applicants in the exercise of their right of individual application.

In the Court's analysis, the obligation set out in Article 34 *"requires the Contracting States to refrain not only from exerting pressure on applicants, but also from any act or omission, which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure."* The objective of an interim measure, from the perspective of both, the applicant and the Court, is to facilitate the "effective exercise" of the right of individual petition under Article 34 by preserving the subject matter of the application held to be at risk of irreparable damage through the acts or omissions of the respondent State.

With effect of Protocol No. 11, the right of individual application is no longer dependent on a declaration by the Contracting State. The Court, therefore, notes that individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.

Reiterating that the Convention must be interpreted in the light of the Vienna Convention of 1969 on the Law of Treaties, here Article 31 § 3 (c)[7], the Court took recourse to general principles of international law, the law of treaties and international case-law, as well as the view expressed on this subject by other international bodies since the *Cruz Varas and Others* judgement, and noted that the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect (see paras 103-127).
The Court observed that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions, had all confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures

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[5] *Soering v. the United Kingdom*, 7 July 1989, 14038/88, § 113
[6] Please note the partly dissenting opinion of Judges Bratza, Bonello and Hedigan, in whose view the evidence before the Court was sufficient to establish the existence of a real risk at the date of extradition that the applicants would suffer a flagrant denial of justice.
[7] Art. 31§3(c) of the Vienna Convention: "There shall be taken into account, together with the context: …(c) any relevant rules of international law applicable in the relations between the parties."

in international law. Whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending[8].
The Court also drew analogy from its understanding of an effective remedy under Article 13 ECHR, which, at the national level, implies a suspensive effect of the remedy concerning measures, which potentially contravene the Convention and carry the risk of irreversible effects.[9] It found it *"hard to see why this principle of effective remedy should not be an inherent Convention requirement in international proceedings before the Court, whereas it applies to proceedings in the domestic legal system."*

Interim measures, as they have been practice under the Convention system, aim at avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. A failure by a respondent State to comply with interim measures, therefore, would undermine the effectiveness of the right of individual application guaranteed by Article 34 ECHR and the State's formal undertaking in Article 1 ECHR to protect the rights and freedoms set forth in the Convention.

In the present case, the extradition prevented the Court from conducting a proper examination of the complaints in accordance with its settled practice in similar cases and ultimately from protecting the applicants, if need be, against potential violations of the Convention. The applicants were thus hindered in the effective exercise of their right of individual application guaranteed by Article 34 ECHR, which the applicants' extradition rendered nugatory.

The Court held ***that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention.***[10]

The Court concluded that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, **Turkey was in breach of its obligations under Article 34 ECHR.**

♦ ***Isayeva, Yusupova and Bazayeva v. Russia*, Final Judgment of 24 February 2005, Appl. No. 57947/00**

- *State responsibility for killings of civilians as result of a military operation, indiscriminate use of weapons*
- *Violation of Article 2 (right to life)*
- *Violation of Article 13 (right to an effective remedy)*

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8 *Soering v. the United Kingdom*, 7 July 1989, 14038/88, p. 35, §§ 89-91.
9 *Čonka v. Belgium*, 5 February 2002, 51564/99, § 79.
10 Please note the concurring opinion of Judge Cabral Barreto, who disagrees with the apparent reasoning of the majority that the mere fact of a Government's failure to comply with interim measures should *per se* entail a violation of Article 34 of the Convention. He reasons that, as the States have always refused to accord binding force to interim measures, the Court cannot do so and impose on the States obligations which they have declined to accept. In his view, there will be a violation of Article 34 of the Convention only if the Contracting State's failure to comply with interim measures prevents the applicant from exercising his right of application and thereby makes an effective examination of his complaint by the Court impossible.

- *Violation of Article 1 of Protocol No.1 (protection of property)*

Facts:
The three applicants were part of a large convoy of vehicles on the way from Groznyy to Ingushetia in October 1999, at a time of intense military operations in Chechnya. The road was blocked by Russian military at the border between Chechnya and Ingushetia. After several hours it was announced that no passage would be permitted that day. The large convoy began to turn around. Shortly afterwards, two Russian military aircraft flew over the column and dropped bombs. The vehicle carrying the first applicant and her relatives stopped. Her two children and her daughter-in-law were the first to get out and were killed by a bomb blast. The first applicant was injured and lost consciousness. The second applicant was wounded in the same attack and witnessed the death of the first applicant's relatives. While the applicants maintained that they had seen only civilians in the convoy, the Government contended that the two aircraft had been flying reconnaissance when they were attacked by large calibre infantry firearms fired from a truck in the convoy. Following authorisation to attack, the pilots destroyed the truck and several other vehicles.

Complaint before the Court:
Under Article 2 ECHR, the first applicant complained that her two children were killed by agents of the State. The three applicants complained that their right to life under Article 2 ECHR was violated by the attacks against the convoy by military planes. They also submitted that the authorities had failed to carry out an effective and adequate investigation into these attacks.

The first and the second applicant complained also that, as a result of the attack, their right to freedom from inhuman and degrading treatment within the meaning of **Article 3 ECHR** had been violated. The third applicant complained that in breach of **Article 1 of Protocol No. 1,** three cars belonging to her, one of them filled with family possessions, had been destroyed as a result of the air strike. The applicants submitted under **Article 13 ECHR** that they had no effective remedies in respect of the above violations**.**

Legal Argumentation:
Article 2 (obligation to protect the right to life)
It was undisputed that the applicants had been subjected to an aerial missile attack, during which the first applicant's two children had been killed and the first and the second applicants wounded. Although the Government failed to submit a copy of the complete investigation file, the materials submitted allowed certain conclusions to be drawn as to whether the operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, damage to civilians. The Government had claimed that the aim of the operation had been to protect persons from unlawful violence. Given the context of the conflict in Chechnya at the relevant time, the Court assumed that the military had reasonably considered that there had been an attack or a risk of attack, and that the air strike had been a legitimate response to that attack. The presence of a 'humanitarian corridor' and a traffic jam of several kilometres long should have been known to the authorities who were planning military operations on that day and should have alerted them to the need for extreme caution as regards the use of lethal force. It did not appear that those responsible for planning and controlling the operation, or the pilots themselves, had been aware of this. The Court held that, even assuming that the military had been pursuing a legitimate aim, the operation had not been planned and executed with the requisite care for the lives of the civilians and concluded to a violation of Article 2 ECHR**.**

Article 2 (obligation to conduct an effective investigation)
A criminal investigation had been opened only with considerable delay and the Court noted a number of serious and unexplained failures to act once the investigation had commenced. The Court found that the authorities had therefore failed to carry out an effective investigation **in violation of the procedural aspects of Article 2 ECHR.**

The Court considered that there was no separate issue under **Article 3 ECHR**.

The Court held that the destruction of Mrs Bazayeva's vehicles and household items during the aerial attack constituted grave and unjustified interference with her peaceful enjoyment of her possessions in **violation of Article 1 of Protocol No. 1 to the ECHR**.

Article 13
Given their "arguable" claim, the applicants should have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible and to compensation. In the present cases the criminal investigation had been ineffective in that it had lacked sufficient objectivity and thoroughness, and the effectiveness of any other remedy, including the civil remedies, had been consequently undermined. Therefore the Court found a **violation of Article 13 ECHR**.

♦ ***Isayeva v. Russia*, Final Judgment of 24 February 2005, Appl. No. 57950/00**

- *State responsibility of authorities for killings of civilians as result of a military operation (indiscriminate use of weapons).*
- *Obligation to carry out an effective criminal investigation with regard to killings*
- *Violation of Article 2 (right to life)*
- *Violation of Article 13 (right to an effective remedy)*

Facts:
The applicant was a resident of the village of Katyr-Yurt in Chechnya. Following the take-over of Groznyy by Russian forces in February 2000, a significant group of Chechen fighters entered her village. At that time, the population of the village had swelled to some 25,000 persons, including many who were displaced from other parts of the country. Chechen fighters arrived without any warning and the villagers were forced to take shelter from the heavy Russian bombardment that commenced shortly afterwards. When the shelling ceased the next day, the applicant and her family, along with other villagers, tried to flee. As their vehicles left the village, they were attacked from the air. The applicant's son was fatally wounded. Three other persons travelling in the same vehicle were also wounded. The applicant also lost three young nieces in the attack, and her nephew was left disabled as a result of his injuries. She lost her house, her possessions and her car. A criminal investigation, opened in 2000, confirmed the applicant's version of events. The investigation was closed in 2002, as the actions of the military were found to have been legitimate in the circumstances, as a large group of illegal fighters had occupied the village and refused to surrender.

Complaint before the Court:
The applicant complained that the way that the military operation was prepared, controlled and executed was in breach of **Article 2 ECHR**. She also complained under **Article 2 ECHR** that the authorities failed to carry out an effective and adequate investigation into the military operation. She further complained that she had no effective remedy under **Article 13 ECHR**.

Legal Argumentation:
Article 2 (obligation to protect the right to life)
The Court accepted that the undisputed presence of a very large group of armed fighters in Katyr-Yurt and their active resistance might have justified use of lethal force by the State agents, thus bringing the situation within paragraph 2 of Article 2. A balance had to be struck between the aim pursued and the means employed to achieve it. The Court concluded that the military operation in Katyr-Yurt had not been spontaneous. The use of heavy free-falling high-explosion aviation bombs in a populated area, outside wartime and without prior evacuation of the civilians, was impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. As no martial law and no state of emergency had been declared in Chechnya, and no derogation has been entered under Article 15 of the Convention the operation therefore had to be judged against a normal legal background. Even when faced with a situation where, as the Government had submitted, the villagers had been held hostage by a large group of fighters, the primary aim of the operation should have been to protect lives from unlawful violence. The indiscriminate use of weapons stood in flagrant contrast with this aim and could not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.

There was not a single reference in the documents reviewed by the Court, to indicate that a safe passage for the population had been observed. The Government's failure to invoke the provisions of any domestic legislation governing the use of force by State agents in such situations was also relevant to the Court's considerations with regard to the proportionality of the response to the attack. Even accepting that the military operation had a legitimate aim, the Court held that it had not been planned and executed with the requisite care for the lives of the civilian population. The Court therefore found a **violation of the right to life under Article 2 ECHR**

Article 2 (obligation to conduct an effective investigation)
An investigation had been opened only upon communication of the complaint to the respondent Government in September 2000. The Court observed several serious flaws in the part of the investigation file submitted to it concerning, *inter alia*, the absence of competent authorities to deal with the corridor, as well as regarding the communication of the information to the applicant concerning the proceedings in violation of the relevant domestic legislation. The Court therefore held that the authorities had failed to carry out an effective investigation into the circumstances of the military operation and had **not respected their procedural obligation under Article 2 ECHR**.

Article 13
The applicant should have been able to avail herself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to compensation. Instead, the criminal investigation had been ineffective and the effectiveness of any other remedy, including the civil remedies, had been consequently undermined in **violation of Article 13 ECHR**

♦ ***Shamayev and 12 others v. Georgia and Russia*, Final Judgment of 12 April 2005, Appl. No. 36378/02**

- *The use of diplomatic assurances in an extradition case; inhuman treatment as result of use of unjustified violence by State authorities; State obligations concerning the effective exercise of the right to apply to the Court*

- *No violation of Article 2 (right to life)*
- *Violation of Article 3 (prohibition of torture)*
- *Violation of Article 5 (right to liberty and security)*
- *No violation of Article 6 (right to a fair trial)*
- *Violation of Article 13 (right to an effective remedy)*
- *Violation of Article 34 (effective exercise of right of individual application)*
- *Violation of Article 38 (examination of the case)*

Facts:
The applicants, of **Russian and Georgian nationality**, were arrested in Georgia in August 2002, and charged, *inter alia*, with crossing the border illegally and placed in pre-trial detention. They were prosecuted in Russia for various offences, one of which was subject to the death penalty. The Russian authorities applied for their extradition. Since Georgian criminal law prohibited extradition of an individual to a country where he or she would be liable to the death penalty, the Georgian public prosecution service sought guarantees on this matter. They were assured that the applicants would not be sentenced to death and would not be tortured or ill-treated. In October 2002 the Georgian authorities agreed to the extradition of five applicants. Special troops used force to remove eleven prisoners from their cell with a view to extraditing four of them. The four persons to be extradited were taken away, the fifth was taken directly from a penitentiary hospital where he was staying. Five applicants were handed over to the Russian authorities on 4 October 2002, in spite of the Court's Rule 39 interim measures. The Court obtained guarantees from the Russian Government in favour of the applicants and an undertaking that it would have unimpeded access to them through correspondence and in the event of an on-site visit. In application of Rule 39, the Court indicated to the Russian Government that the extradited prisoners' lawyers should be allowed to meet them in prison with a view to preparing a hearing before the Court. The Russian Government did not comply with this interim measure and challenged the validity of the lawyers' powers to represent the applicants. The extradition of the other applicants, agreed to by the Georgian authorities in November 2002, was suspended or cancelled by the courts. Two applicants were arrested by the Russian authorities in February 2004 after disappearing in Tbilisi. The Court decided to carry out a fact-finding visit to Georgia and Russia. Given the unresponsive attitude of the Russian authorities, only the Georgian part of the visit was carried out.

Complaints before the Court:
The applicants complained under **Articles 2 and 3 ECHR** of a risk to be sentenced to death penalty and of ill-treatment after their extradited to Russia. Under **Article 3** they also complained about the violence, used to remove them from their cells in Georgia. Under **Article 5 ECHR** they complained not to have been informed about the reasons of their detention and not to have had access to their files. Relying on **Article 6 § 1 and 3 ECHR** the applicants complained that in Russia they had no fair trial as they were held incommunicado and had no contact with their lawyers.

Legal Argumentation:
Preliminary objections: The Russian Government challenged the applicants' correct representation before the Court. While it was true that the extradited applicants had not themselves signed the documents, the Court held that this was explained by the situation (extradition under extremely urgent procedure with no possible access to the prisoners) and could not therefore be held against them. The applicants had subsequently approved their representatives' actions and the Russian Government had removed any possibility of objective verification of their submission by failing to comply with the Court's interim measure. Therefore any doubts in this respect were removed.

Article 3
Alleged risks of being sentenced to death penalty and of ill-treatment following extradition to Russia:
Before taking a decision on the extradition request, the Georgian authorities sought assurances from the Russian authorities to ensure that the applicants would be protected against those risks. The Court held that the extradition requests were granted on the strength of explicit guarantees (i.e., moratorium on capital punishment in force in Russia for the previous six years and a judgment by the Constitutional Court prohibiting courts from imposing such a sentence) and there was nothing to cause the Georgian authorities to doubt their credibility. The Georgian authorities had only agreed to the extradition of those applicants whose identity could be established and who allegedly held Russian passports at the time of their arrest, and the applicants had not been sentenced to the death penalty in Russia. Admittedly, the majority of the applicants had been unable to inform either the Court or their representatives about their situation in Russia following extradition. However, the evidence submitted by their lawyers did not establish a violation of Article 3. The mere possibility of ill-treatment did not in itself entail a violation of Article 3, especially as the Georgian authorities had obtained guarantees to that effect from their Russian counterparts. Therefore the Court found: **no violation of Article 3 ECHR** by Georgia as regards the five extradited applicants.

Article 3
The Court examined the case of the applicant in relation to whom an extradition order had been signed in November 2002 and suspended following an appeal; that order was subject to enforcement at the close of pending proceedings. In the light of events subsequent to November 2002 the Court considered that the assessments on which the decision had been taken to extradite that applicant no longer sufficed, at the date on which it examined the case, to exclude all risk of ill-treatment prohibited by the Convention. The Court concluded that there **would be a violation by Georgia of Article 3** if the decision to extradite Mr Gelogayev to Russia, dated November 2002, were to be enforced.

Article 2
There was nothing to justify the assertion that, at the time when the Georgian authorities took the decision to extradite, there were serious and well-founded reasons to believe that extradition would expose the applicants to a real risk of extrajudicial execution. Therefore the Court found **no violation by Georgia** in respect of the five extradited applicants.

Article 3;
Use of physical force when removing applicants from the cell with a view to extradition:
The applicants had resisted removal from their cell and had armed themselves. The involvement of the special forces could therefore reasonably have been considered necessary to ensure safety and prevent disorder. However, with regard to the authorities' attitude during the extradition enforcement procedure, the use of physical force was not justified by the prisoners' conduct and raised an issue under Article 3 ECHR. Besides mental suffering, the injuries inflicted on certain applicants by the special forces were serious and there had been no medical examination and treatment in good time. That suffering amounted to inhuman treatment. The Court concluded to a **violation of Article 3 by Georgia** in respect of the eleven applicants.

Articles 5(2) and 5(4)
The Georgian authorities had not informed the applicants that they were being held pending extradition and the applicants' lawyers had not had access to the extradition files, in violation

of Article 5(2). The same fact had deprived of all substance the applicants' right to appeal against their detention in the context of extradition proceedings in **violation of Article 5(4)**.

Article 13 taken together with Articles 2 and 3
The absence of **a notification of the extradition decision** to the applicants, who only heard about the extradition in general terms on a TV broadcast the evening before the extradition, had prevented the applicants from exercising their right to an effective remedy in **violation of Article 13 ECHR**.

It is worth noting that the Court also took into account the inadequate character of the notification to examine the allegation of violation of Article 3 by Georgia when removing the applicants from the cell with the view to extradition. The Court considered that the failure of the authorities to specify among the group the ones, who were affected by the extradition decision, had kept the applicants in a state of desperate uncertainty and contributed to the violation of **Article 3 ECHR** in respect of five applicants.

Article 34 (Georgia)
After their extradition to Russia, the applicants were held *incommunicado*. The Russian authorities had not permitted the applicants' representatives before the Court to visit them, in spite of the Court's explicit indication under Rule 39, and the Court had been unable to carry out its fact-finding visit to Russia in order to question them. The Court had not been in a position to complete its examination of the merits of their complaints against Russia. The gathering of evidence had thus been frustrated. The difficulties faced by those applicants after their extradition had seriously hindered the effective exercise of their right to appeal as guaranteed under Article 34. Therefore, in failing to comply with the Rule 39 interim measure, Georgia had failed to discharge its obligations under Article 34 ECHR in respect of four applicants. Therefore the Court found a **violation of Article 34 ECHR by Georgia**.

Article 3, 6, 38(1) (Russia)
The extradited applicants alleged a violation of **Article 3 and Article 6(1) and (3)** in respect of Russia. The Court had been unable to establish the facts in Russia despite the fact-finding visit and the materials that had been submitted by the parties did not enable it to decide on Russia's alleged violation of Article 3 and Article 6(1) and (3). By refusing to allow the Court's delegates' access to the applicants held in Russia and by raising obstacles to the Court's fact-finding mission, Russia **had violated Article 38 §1 a ECHR**.

Article 34 (*Russia)*
The Russian Government had failed to honour the commitments they had given to the Court in November 2002 with regard to access to those applicants who were being held *incommunicado* and, despite the Court's requests to that effect, the applicants' representatives had never had access to them. The written communications with the extradited applicants had been insufficient to ensure effective examination of an appreciable portion of their application. The Court itself had sent letters to the extradited applicants, but the result gave rise to serious doubt as to the extradited applicants' freedom to correspond with the Court and to put forward their complaints in greater detail. Furthermore, the Court had been unable to question in Russia the applicants who had disappeared a few days before the arrival of the Court's delegation in Tbilisi and who were arrested three days later by the Russian authorities. The measures taken by the Russian Government had hindered those applicants' effective exercise of the right to apply to the Court. Therefore the Court found a **violation of Article 34 by Russia** in respect of seven applicants.

♦ ***Muslim v. Turkey*, Final Judgment of 26 April 2005, Appl. No. 53566/99**

- *General assessment of the security situation in Iraq after the fall of the Sadam Hussein regime, which may affect further applications from Iraqi rejected asylum seekers*
- *No violation of Article 2 (right to life)*
- *No violation of Article 3 (prohibition of torture)*
- *No violation of Article 8 (right to private and family life)*
- *No violation of Article 13 (effective remedy)*

Facts:
The applicant is an **Iraqi** national, of ethnic Turkmen origin. His brother Hassan died 17 January 1991 during the Gulf war. The family was told by another soldier that Hassan was executed after he had tried to desert the army. In May 1994 another brother of the applicant, Ismail Hassan was convicted for the forging of papers and sentenced to 15 years imprisonment. The applicant was informed that this brother worked for a dissident organisation. From this the applicant deducted that his brother was convicted because of his political activities. In February 1998 the government expropriated 200 hectares of land of the applicant's grand father. Although a compensatory allowance was granted, it was never paid. In August 1998 the applicant and his cousin went to Jasim Al- Takriti, head of the regional authority, to discuss the matter. In the quarrel the cousin shot Al- Takriti. Both the applicant and the cousin escaped. Next day the cousin was arrested and, under torture, accused the applicant to have shot Al- Takriti. The applicant decided to leave Iraq. Before his departure an acquaintance handed him a copy of a warrant for his arrest, in which it was stated that the applicant was under the suspicion of espionage and treason. He left the country and reported himself to the UNHCR in Turkey in September 1998. At the same time he applied for asylum at the Turkish government and further applied for a temporary refugee status, awaiting the possibility to settle in a "European third country". During his stay in Turkey he was informed that his mother was detained and questioned about the applicant's whereabouts several times and that his cousin and his brother Ismail were executed. The UNHCR decided that the applicant did not substantiate that he was persecuted on the grounds as provided for in the 1951 Convention. The applicant was provided with a temporary residence permit, which is renewed every six months, awaiting the possibility to settle in a "European third country".

Complaint before the Court:
Invoking **Articles 2 and 3 ECHR** the applicant complained that if expulsed to Iraq he will be executed by the Iraqi Government. Under **Article 13 ECHR** he complained of a lack of an effective remedy regarding the decisions of the Turkish authorities and the UNHCR. Relying on **Articles 3 and 8 ECHR** the applicant complained about his current living conditions.

Legal Argumentation:
During the applicant's stay in Turkey the Iraqi government fell and radical changes took place. The Court decided not to examine the original complaints of the applicant with regard to the situation before the fall of Saddam regime but instead **under the circumstances at the date of the examination of the complaint**. The Court held that the part of the application relating to the risk of ill treatment of the applicant by Sadam Hussein forces was deprived of its object given the change of regime in Iraq, but accepted to examine the new arguments submitted by the applicant in July 2003 under Article 3 ECHR. The applicant claimed that, given the insecurity in Iraq following the US intervention, he would face a risk of torture or inhumane or degrading treatment if expelled.

The Court subsequently considered on the basis of a number of reports of international organisations, including the 2004 UNHCR Advisory regarding the return of Iraqi, that security risks exist in the North of Iraq and that particularly in the regions of Mosul and Kirkuk disputes between Kurdish, Arab and Turkmen communities occur. However, the Court held that it was not proved that the personal situation of the applicant could be worse than the one of other members of the Turkmen minority and even, perhaps, of the situation of other inhabitants of Northern Iraq. The Court recalled the need to prove the individualized dimension of the risk of ill-treatment under Article 3 and that the instability observed in a given country was not sufficient to find a violation of this provision (para. 70).**.** Interestingly enough, the Court added that, in the present case, the above is even less likely since a democratization process is under way in Iraq, which might lead to an improvement of the situation. Such a consideration seems unnecessary since the Court found that the case was not substantiated.

Taking into account the engagement of the Turkish government not to expel the rejected asylum seekers as well as the voluntary repatriation plan of Iraqi being set up by the UN (para. 71), the Court concluded that the possible expulsion of the applicant will not expose him to a real risk of ill treatment prohibited under Article 3.

The Court did not consider that it was necessary to consider the complaints in conjunction with **Article 2 ECHR**.

As to the complaint under **Article 13 ECHR** the Court considered **the complaint to be premature** as at present no order for the applicant's expulsion has been given.

The Court further considered that the applicant's complaint regarding his current living conditions in Turkey does **not fall within the scope** of **Article 8 ECHR** and do **not reach the threshold** of **Article 3 ECHR.**

♦ ***Öcalan v. Turkey*, Final Judgment of 12 May 2005, Appl. No. 46221/99, Grand Chamber**

- *No violation of Article 2 (right to life)*
- *Violation of Article 3 (prohibition of torture)*
- *Violation of Article 5 (right to liberty and security)*
- *Violation of Article 6 (right to a fair trial)*
- *No violation of Article 34 (effective exercise of right of individual application)*

The Grand Chamber made the same findings as the Chamber in its judgment of 12 March 2003[11]

♦ ***Suheyla Aydin v. Turkey*, Final Judgment of 24 May 2005, Appl. No. 25660/94**

- *State responsibility for death of person after arrest; obligation to carry out an adequate and effective investigation*
- *Violation of Article 2 (right to life)*
- *Violation of Article 3 (prohibition of torture)*
- *No violation of Article 11 (freedom of assembly and association)*

[11] See *UNHCR Manual on Refugee Protection and the ECHR - Update January-June 2003*, pp. 3-5

- *Violation of Article 13 (effective remedy)*
- *No violation of Article 14 (prohibition of discrimination)*
- *Violation of Article 38 (examination of the case)*

Facts:
The facts of the case, particularly those events which occurred between 18 March 1994 and 9 April 1994, are disputed by the parties. In the judgment an extensive part is devoted to the parties' submissions on the facts and the investigations by the Commission and the Court.

The applicant is a **Turkish** citizen of Kurdish origin. She lives in Switzerland where she has been granted **political asylum**. She was the wife of Necati Aydın. She alleged that she and her husband had been taken into police custody where she had been subjected to inhuman and degrading treatment and her husband to torture by Turkish police. The Court noted that it was not in dispute between the parties that the applicant's husband was detained by the police on 18 March 1994 and was subsequently brought before the judge at the Diyarbakır Court on 4 April 1994 who ordered his release. It was disputed whether Necati Aydın was physically released on this latter date. According to the applicant, her husband Necati Aydın was never physically released after the judge's order on 4 April 1994. He was shot dead on a later date allegedly by agents of the State. The Government denied this.

Complaint before the Court:
The applicant complained under Articles **2 and 3 ECHR** about the arrest and death of her husband and about ill treatment or torture during her own detention. She further complained that the authorities failed to carry out any meaningful investigation. Invoking **Article 11 ECHR** she complained that her husband was killed on account of his labour union activities. Invoking **Article 13 ECHR** she complained about the fundamental flaws in the investigation into the murder of her husband. The applicant complained that the rights of her husband under Articles 2 and 13 ECHR were violated in conjunction with **Article 14 ECHR** on the grounds of ethnic origin.

Legal Argumentation:
The Court established that the Government has failed to account for the death of Necati Aydın who was last seen alive in the hands of State agents and subsequently met with a violent death. It followed that there has been a **violation of Article 2 ECHR.**

The Court concluded that the domestic authorities **failed to carry out any meaningful investigation**, let alone an adequate and effective one, into the killing of the applicant's husband **as required by Article 2 ECHR**.

The Court concluded that there has been a **violation** of **Article 3 ECHR** on account of the treatment to which the applicant's husband was subjected prior to his death. As regards the treatment to which the applicant allegedly was subjected during her detention, the Court observes that, other than her own allegations, there is no evidence to support her complaint. The Court was **unable, therefore, to reach to a conclusion in this respect.**
The applicant argued that, where a person falls into a category of people who are at risk from unlawful violence from State officials on account of trade union activities, the issues under Article 2 and Article 11 need to be considered separately. She asked the Court to find a violation of **Article 11 ECHR**. The Court noted that these complaints arise out of the same facts as those considered under Article 2 and **does not consider it necessary to examine these complaints separately**.

The applicant submitted that the fundamental flaws in the investigation into the murder of her husband also gave rise to a violation of **Article 13 ECHR**. The Court finds that the applicant has been denied an effective remedy in respect of the inhuman treatment and death of her husband, and has thereby been denied access to any other available remedies at her disposal, including a claim for compensation. Consequently, there has been a **violation of Article 13 ECHR**.

Having regard to its findings under **Articles 2, 3 and 13 above, the Court does not find it necessary to determine** whether the failings identified in this case were **part of a prac**tice adopted by the authorities.

The Court noted its findings of a violation of Articles 2 and 13 ECHR and does **not consider that it is necessary** also to consider these complaints in conjunction with **Article 14 ECHR**.
The Court concluded that the Government have not advanced any (convincing) explanation for their delays and omissions in response to the Commission's requests for relevant documents, information and witnesses. Accordingly it found that the Government **fell short** of their obligations under **Article 38 § 1 (a) ECHR** to furnish all necessary facilities to the Commission and the Court in their task of establishing the facts.

♦ ***Sisojeva and others v. Latvia*, Judgment of 16 June 2005, Appl. No. 60654/00**

- *Refusal of residence permit; State obligation to strike a fair balance between general and individual interest.*
- *Violation of Article 8 (right to respect for private and family life)*
- *No violation of Article 34 (effective exercise of right of individual application)*

This case is not final since it has been referred to the Grand Chamber.

Facts:
The applicants, a married couple and a daughter, reside in Latvia since the late 60s. After the break-up of the Soviet Union they remained without nationality. After an unsuccessful application for a permanent residence status, the applicants only received temporary residence permits. In 1995 the Latvian authorities discovered that in 1992 the applicants had obtained passports of the former Soviet Union, which had allowed them to register in Russia. In 1996 the father and the daughter obtained the Russian nationality. A further application to obtain permanent residence was rejected. In November 2003 the applicants received a letter, explaining how to proceed in order to regulate their residence in Latvia.
The applicants however did not obtain residence permits. The mother was questioned by the police in 2002, with regard to the complaint at the Court.

Complaint before the Court:
The applicants complain about a breach of their rights under **Article 8 ECHR**. They refer to their exceptional situation, due to the collapse of the Soviet Union. They emphasize that they have strong ties with Latvia, where the father and mother have lived for more than thirty years and are integrated in society. The daughter was born in Latvia. They further refer to the fact that another daughter and her family reside in Latvia. Under **Article 34 ECHR** they complained that they have been intimidated by the Latvian government to make them withdrawn their application.

Legal Argumentation:
The Court considered that in spite of the fact that the Latvian Government regulated the applicant's residence in Latvia during the proceedings at the Court, the applicants still can claim to be victim under **Article 34 ECHR**.

With regard to the duration of the applicants' stay in Latvia the Court held that the continued refusal to grant them a permanent residence permit was interfering with their private life. No interference with their family life has been established. With regard to the circumstances of the case, the Court held that the Latvian authorities exceeded their margin of appreciation and failed to strike a fair balance between the legitimate aim of the general interest and the interests of the applicants. Therefore the interference was not held to be necessary in a democratic society and the applicants' rights under **Article 8 ECHR** have been **violated**.

As to the complaint under Article 34 ECHR the Court considered that the authorities had submitted that the mother was questioned after she had appeared in a television show, in which she had expressed accusations of corruption within the government. It was established that during the interrogation the applicant was also questioned about her complaint at the Court. With regard to all circumstances of the case the Court held that the questioning by the police did not reach the threshold of "pressure" or "intimidation". **No violation of Article 34 ECHR.**

2. Court Decisions

A. Cases declared admissible

♦ *Kambangu v. Lithuania*, Decision of 17 March 2005, Appl. No. 59619/00

- *Unlawful deprivation of liberty during the asylum procedure*
- *Article 5 § 1 and § 4 (right to liberty and security)*

The applicant is an **Angolan** national. He arrived in Lithuania on 2 March 1998 with a transit visa valid until 4 March 1998. On 10 March 1998 the applicant was arrested while trying to cross the Lithuanian-Belarus border without passport. According to the applicant, on 12 March 1998 he was moved from a police station to an Aliens Registration Centre ("ARC") on the ground that he was staying in Lithuania illegally. The Government stated that the applicant requested residence at the ARC of his own free will. From June 1998 to December 1999, the applicant applied unsuccessfully for **asylum in all instances**. At the same time, he challenged his continued stay at the ARC, claiming that it amounted to unlawful detention. In October 1999 the Higher Administrative Court rejected the applicant's complaint, finding that the ARC was not a place of deprivation of liberty and he was being held there in accordance with the governmental regulations. The applicant's appeal against this decision was rejected by the Court of Appeal in December 1999. Having obtained a new passport the applicant left the ARC on 21 January 2000. It appears that he brought no further proceedings regarding the legality of his stay in Lithuania.

The applicant complained under **Article 5 § 1 ECHR** that on 12 March 1998 he had been unlawfully transferred and held at the ARC for more than 22 months, there being no domestic legal basis for that deprivation of liberty. He further complained under **Article 5 § 4 ECHR** about the inability to obtain a court review of that deprivation of liberty.

The Court considered, in the light of the parties' submissions, that the application was **admissible under Article 5 § 1 and § 4** ECHR.

♦ ***Aoulmi v. France*, Decision of 10 May 2005, Appl. No. 50278/99**

- *Deportation after interdiction to reside in France; complaint regarding the lack of medical treatment in the country of origin and family life.*
- *Article 3 (prohibition of torture)*
- *Article 8 (right to respect for family life)*

The applicant is an **Algerian** national, born in 1956. He arrived in France in 1960, together with his parents and siblings, all in possession of the French nationality. The applicant has been married and is the father of a daughter, born in 1983. In 1989 the applicant was convicted and *inter alia* sentenced to a permanent interdiction to reside in France. The applicant was diagnosed with chronic hepatitis. The applicant's appeals and requests for an adjournment of the permanent interdiction have all been rejected. In August 1999 the applicant applied for **asylum**, which request was rejected. On 19 August 1999, the applicant was deported to Algeria. In December 2000 the Lyon Administrative Court quashed the deportation order as it was established that the medications, necessary for the treatment of the applicant's hepatitis are not available in Algeria. The applicant is unable to return in France, due to the fact that the Algerian authorities refused to supply him with a passport and the French authorities refuse to supply him with a laissez-passer.

The applicant complained that his expulsion to Algeria is in breach of **Article 3 ECH**R as he feared persecution, due to activities of his father. Invoking the same provision he complained that the necessary medical treatment is not available in Algeria. Under **Article 8 ECHR** he complained that his expulsion is in breach with his right to family life The Court considered, in the light of the parties' submissions, that the application was **admissible under Articles 3 and 8 ECHR**.

In this case, despite the interim measure that had been indicated by the Court under Rule 39 France extradited the applicant to Algeria. The Court considered that at a later date it will be examined whether France violated Article 34 ECHR.

♦ ***Said Botan v. the Netherlands*, Decision of 12 May 2005, Appl. No. 1869/04**
♦ ***Ibrahim Mohamed v. the Netherlands*, Decision of 12 May 2005, Appl. No. 1872/04**

- *Obligation to obtain provisional residence visa prior to arrival in the Netherlands in violation of right to respect for family life.*
- *Article 8 (right to respect for family life)*

Both cases concern the same matter, namely the obligation under Dutch law to obtain a provisional residence visa, prior to arrival in the Netherlands. Both applicants are **Somali** nationals. Their application for residence permits made in the Netherlands was rejected due to the lack of provisional residence visa. The applicants were expected to return to Somalia or a neighbouring country to apply for the required visa. Given the lack of recognized authorities necessary to provide for the necessary travelling documents, this obligation poses great difficulties for Somalia nationals.

Said Botan came to the Netherlands on 2 January 1995 and applied for **asylum**. Her request was rejected. The applicant submitted that in 1996 she had started a relationship with a Mr Omer Farah Ali. The applicant and Mr Ali married and had three children. The applicant requested a residence permit for the purpose of staying with her spouse. This request was denied by the Deputy Minister of Justice for the reason that the applicant did not hold the required provisional residence visa which had to be applied for at a representation of the Netherlands in the country of origin or, if there was no such representation in the country of origin, at the representation situated closest to that country. The decision was upheld in appeal.

Ibrahim Mohammed came to the Netherlands in 1998 and applied for **asylum**. Ultimately his request was rejected. In 1998 the applicant had started a relationship, married and had two children. He requested a residence permit for the purpose of residing in the Netherlands with his spouse. This request was denied for the same reason as Ms Botan. The applicant's objection and appeal were rejected. He had submitted that despite having contacted all the relevant authorities, he had not been able to obtain a travel document

In both cases the possibility to obtain valid documents from a Somali representation, necessary to travel to Somalia or a neighbouring country to obtain provisional visa, is disputed. The Dutch Implementation Guidelines to the Aliens Act states that as there is no internationally recognised central authority in Somalia, the Netherlands do not recognise Somali authorities or documents issued by them, including travel documents. Somali nationals are in general accepted to have established that they are unable or no longer able, to be issued with a valid international travel document by the Government of their country. Despite this policy in proceedings regarding the lack of provisional residence visa it is held that Somalia citizens are able to travel back to Somalia or a neighbouring country, to apply for a provisional residence visa.
On 14 December 2004 in another case, a Dutch Regional Court granted an injunction to a Somali national whose request for a residence permit for the purposes of staying with his partner had been rejected because he did not have a provisional residence visa. The judge considered that it had not appeared that the information, on which the Government based their claim that the appellant could apply for such a visa in either Kenya or Ethiopia, and which information dated from 2001 was still correct. Bearing in mind the absence of internationally recognised authorities in Somalia which issued passports, the judge was further of the opinion that the Government had failed to examine how and why a passport, which they claimed the appellant could obtain from Somali representations in Europe, might be of use. The Government were further found to have omitted to investigate whether the appellant would be able to travel to Kenya or Ethiopia and to stay there for a number of months, using an EU *laissez-passer*. In this context the judge took into account that it appeared that Somali nationals were required to have a passport and a visa in order to enter the countries neighbouring Somalia.
The applicants complained that the national authorities violate their right to respect for family life as guaranteed in **Article 8 ECHR**.
The Court considered in both cases, in the light of the parties' submissions, that the application was **admissible** under **Article 8 ECHR**.

♦ ***Kalanyos and others v. Romania*, Decision of 19 May 2005, Appl. No. 57884/00**

- *Destruction of Roma homes amounting to treatment contrary to Article 3 ECHR (prohibition of torture)*

- *Authorities' failure to carry out an adequate criminal investigation in violation of Article 6 ECHR (right to a fair trial)*
- *Article 6 (Right to a fair trial)*
- *Article 8 (right to respect for private and family life)*
- *Article 13 (Right to an effective remedy)*
- *Article 14 (prohibition of discrimination)*

The applicants, who are of **Roma** origin, live in a village together with non-Roma people. On 6 June 1991, a fight broke out between four Roma and a night watchman, for which the first applicant was sentenced to three years' imprisonment. Following the events, a crowd of non-Roma villagers assaulted and fatally injured two men. Two days later, they displayed a notice informing the Roma inhabitants that their houses would be set on fire the following day. The local authorities, who had been informed by the Roma, failed to intervene, "advising" the Roma to leave their homes for their own safety. On 9 June 1991, all twenty-seven Roma houses and their contents were set on fire and completely destroyed. During the following year, the Roma villagers were forced to live in nearby stables in dreadful conditions (without heating or running water). A police investigation was started. The applicants' lawyers were refused access to the case-file. In 1996, the Prosecutor's Office closed the investigation on the grounds that the prosecution of the offences was statute-barred. The applicants' appeals were rejected, on the grounds that the offences had been committed "as a result of serious acts of provocation of the victims" and that, given the large number of persons involved, it had been impossible to identify the perpetrators. The applicants rebuilt their houses between 1991 and 1993. It appears that they have yet to receive compensation for the belongings and furniture lost during the events.

The applicants complained that after the destruction of their homes they had had to live in very poor conditions, which amounted to treatment contrary to **Article 3 ECHR.** They complained that the authorities' failure to carry out an adequate criminal investigation into the events, had deprived them of the right to a fair trial within the meaning of **Article 6 ECHR**. The applicants complained that the Romanian authorities had breached **Article 8 ECHR** by failing to prevent and to respond adequately to the events that had led to the destruction of their homes. The applicants complained under **Article 13 ECHR** that they were denied an effective and comprehensive remedy. Finally, the applicants complained that the violations they had suffered as a result of the events were predominantly due to their Roma ethnicity, and therefore discriminatory, in breach of **Article 14 ECHR**, taken together with Articles 3, 6 § 1 and 8 ECHR.
The Court considered, in the light of the parties' submissions, that the application was **admissible** under **Articles 3, 6, 8, 13 and 14 ECHR**.
The Government's **objections** as to non-exhaustion and lack of victim status were **dismissed**.

Two similar cases concerning the destruction of houses belonging to Roma and their expulsion from villages are pending before the Court: *Gergely v. Romania* (N° 57885/00) and *Tănase and Others v. Romania* (N° 62954/00).

B. Cases declared inadmissible

♦ *Pellumbi v. France*, Decision of 18 January 2005, Appl. No. 65730/01

- *Applicant not a victim within the meaning of article 34*
- *Article 8 (right to respect for family life)*

The applicant is an **Albanese** national. He entered France in 1990 and was recognized as a **refugee**. In 1993 the applicant had a child with a French citizen. In 1997 the applicant was convicted for the trafficking of drugs and sentenced to three years imprisonment. A permanent ban from the French territory was imposed. In 1998 the applicant's request to raise the ban was rejected. After having served his prison sentence the applicant was released on 10 June 1999. In a ministerial decision, taken into account the refugee status of the applicant, which was not cancelled, it was determined that the applicant had to stay in the area of Nice. The permanent ban was not withdrawn. It does not appear from the decision that the applicant challenged the ministerial decision. Invoking **Article 8 ECHR the applicant complained** that the rejection of his request to raise the ban is in breach of his right to family life.

The Court primarily considered the question as to whether the applicant is a victim within the meaning of **Article 34 ECHR.** Therefore the Court established whether the applicant had a risk to be subjected to any direct effect of the alleged violation. It was held that the ministerial decision of the area arrest to Nice in fact deprived the ban order of its effect. In the case of rescission of the area arrest the applicant has a legal remedy to challenge this decision and all other decisions affecting the collection of guaranties regarding his position. The Court considered that the expulsion order is outdated so that a new order has to be given in the case that the French authorities want to expel the applicant, taking into account the applicant's situation at that time. The applicant's criminal record is not a legal reason for cessation of the recognition as refugee. With regard to these circumstances it is held that the applicant does not incur a risk to be removed from France in the near or immediate future. Subsequently it is held that the applicant cannot be regarded as a victim of a violation of **Article 8 ECHR** within the meaning of **Article 34**. The complaint is declared **inadmissible.**

♦ ***Djemailji v. Suisse*, Decision of 18 January 2005, Appl. No. 13531/03**

- *Applicant not a victim within the meaning of article 34*
- *Article 3 (prohibition of torture)*
- *Article 8 (right to respect for family life)*

In December 1990 the applicant's father, a **Serbia and Montenegro citizen**, of Roma origin, applied for **asylum** in Switzerland, also on behalf of the applicant. The asylum application was rejected. However the departure was postponed regularly. In March 1998, July 2000 and May 2001 the applicant was repeatedly convicted and sentenced to terms of imprisonment for various crimes, such as theft, the damaging of property, the consumption of hashish, extortion, robbery with violence and sexual assault. In a humanitarian action the Switzerland authorities decided to grant a temporarily residence permit to those persons who had applied for asylum before 31 December 1992. Due to the applicant's criminal record he was excluded from this action and it was held that he should leave the country. In April 2003 the applicant applied for a reconsideration of his case. In a decision of 28 May 2003 the applicant was allowed to remain in Switzerland for the duration of the proceedings, which are at current still pending.

Invoking **Article 8 ECHR** the applicant complained that the decision ordering his expulsion from Switzerland is in breach of his right to family life with his parents and siblings. The applicant further complained that his expulsion would be in breach with **Article 3 ECHR**.
The Court primarily considers whether the applicant is a victim within the meaning of **Article 34.** As the applicant is allowed to remain in Switzerland for the duration of the proceedings which are still pending at current it cannot be held that the applicant incurs a risk to be removed from Switzerland in the near or immediate future. Subsequently it is held that the

applicant cannot be regarded as a victim of a violation of **Articles 3 and 8 ECHR** within the meaning of **Article 34**. The complaint is declared **inadmissible**.

♦ ***Cicek v. Turkey*, Decision of 18 January 2005, Appl. No. 67124/01**

- *Government responsibility with regard to the investigation into the death of the applicant's son following his expulsion*
- *Article 2 (right to life)*
- *Article 13 (right to an effective remedy)*

After his **asylum** application had been dismissed in the Netherlands the applicant's son had been expulsed to Turkey. As he had to perform his military service he was transferred to a military base immediately upon his arrival in Turkey. On 5 August 1999 the applicant was informed of his son's death on 4 August. The military prosecutor directed a nonsuit, as it appeared from investigations that the applicant's son had committed suicide and the involvement of a third person could not be established. The applicant's objections to the nonsuit were rejected.

Invoking **Article 2 ECHR** the applicant complained that his son died while being under the State's responsibility. Relying on **Article 13 ECHR** the applicant complained of a lack of effective remedy.

The Court noted that under **Article 2** the State is responsible for the conduct of an impartial and public investigation to establish the particular circumstances of the death of the applicant's son. The Court ruled that it could not be established that the investigations into the facts of the case had been insufficient or that an effective remedy had been lacking. The application was held to be **manifestly ill-founded under Article 2**. Since the applicant had no arguable claim under article 2 the complaint under **Article 13 did not require further examination**. For these reasons the application was declared **inadmissible.**

♦ ***Sijaku v. the Former Yugoslav Republic of Macedonia*, Decision of 27 January 2005, Appl. No. 8200/02**

- *Applicant not a victim within the meaning of article 34*
- *Article 2 (right to life)*
- *Article 3 (prohibition of torture)*

The applicant is a **Serbia and Montenegro national** of ethnic Albanian origin, who was residing in Kosovo. In 1998, when the security situation in Kosovo deteriorated, the applicant was directing Serbian police to houses of political opponents of the regime. The local Albanians marked the applicant as a collaborator of the Serbs and a traitor and suspected him of being a member of the "Black Hand" organisation (an alleged Serbian terrorist organisation). Following the withdrawal of the Serbian security forces from the province and the arrival of the NATO-led peacekeeping forces (KFOR) in June 1999, he was allegedly kidnapped and detained by the KLA members on two occasions and interrogated about the "Black Hand" organisation, his connections with the Serbian police. The applicant alleged that he was ill-treated and that he tried to kill himself. He managed to escape, went into hiding and ultimately returned to his home town, where he was again discovered by the KLA. In the spring of 2000 four KLA members attempted to assassinate him. The incident was reported to KFOR and to the field delegate of the International Committee of the Red Cross, who

suggested him to leave Kosovo. On 25 August 2000, with the assistance of a protection officer of the UNHCR, the applicant was driven to the border of fYROM.

In fYROM, the applicant was granted the status of Temporary Humanitarian Assisted Person ("THAP"). On 27 April 2001, after the THAP status for Kosovo Albanians expired, the applicant filed an asylum application with the Ministry of the Interior. Despite a memorandum from the office of the ICTY in Skopje, in support of the applicant's asylum request, the Ministry of the Interior rejected the request for asylum. It was held that the applicant's statements had been intentionally false and contradictory, and he had no well-founded fear to be persecuted if returned to his country of origin. Further appeals were not successful
In dismissing his application, the Supreme Court noted that the applicant could have enjoyed effective protection, if not in Kosovo, at least in other parts of his country of origin.
On 7 February 2002 the applicant was issued a request to leave the country by the Ministry of the Interior. In a letter of 19 February 2002 to the UNHCR Protection officer in Skopje, the ICTY Chief of Investigations confirmed that the applicant was a potential witness and was expected to be called to testify in future trials to be held by the Tribunal. Furthermore, he stated that in the light of the information available to the Tribunal it would not be safe for the applicant to be returned to Kosovo or Serbia due to the very real expectation that his basic human rights would be under threat. On 28 February 2002 the Court indicated an interim measure under Rule 39. By letter of 13 March 2002, the Government informed the Court that the applicant would not be expelled and that the Ministry of the Interior was investigating with the UNHCR the possibility of the applicant's transfer to a third State. On 26 March 2002 the applicant voluntarily left the Transit Centre for Foreigners. Ever since then the applicant has been under the protection of the ICTY as a potential witness and has been taken to a temporary safe address.

The applicant complained **under Articles 2 and 3 ECHR** that he would face a serious risk of being killed and being subjected to torture or inhuman treatment if he were to be expelled to his country of origin, Serbia and Montenegro.

The Court found that since the applicant voluntarily left the Transit Centre and left fYROM for a safe third country under the witness and victim protection programme of the ICTY, he can no longer claim to be at imminent risk of expulsion. The applicant's assertion that he would be returned to Macedonia after the conclusion of his duties as a witness is to a large degree hypothetical and speculative. Even if it were the case, the applicant's return would take place at an unspecified future time, when circumstances in both the fYROM and the Republic of Serbia and Montenegro, and the elements of risk on which the applicant now relies, may be significantly different. It would be open to the applicant to make a fresh application at that stage if he were to consider that circumstances placed him at risk of a violation of his Convention rights. The Court accordingly finds that the applicant **cannot** at this time **claim to be a victim** of a violation of the ECHR within the meaning of **Article 34 ECHR**. For these reasons, the Court declares the application **inadmissible**.

♦ ***M.H. Mawajedi Shipohkt and A. Mahkamat Shole v. the Netherlands*, Decision of 27 January 2005, Appl. No. 39349/03**

- *Obligation for applicant to submit evidence with regard to alleged violation*
- *Article 3 (prohibition of torture)*

The applicants are **Iranian nationals**. They are husband and wife. The wife was born into a family that opposed the Islamic revolution in Iran. After her father had been killed, her mother married an activist of the Marxist political organisation Rah-e-Kargar, referred to hereinafter as the stepfather. In the early 1980s the stepfather received a twenty-year prison sentence. The female applicant and her mother were detained for a year. Following conditional release in 1989, the stepfather went into hiding after learning that his name appeared on a hit list. The female applicant then took over his political activities. A few months before she eventually left Iran she was beaten unconscious by a group of students. Following threats by telephone, she went into hiding. On 22 November 1999 her parents' house was searched. A few weeks later she left Iran with a "travel agent". On 23 January 2000 she lodged a request for **asylum** in the Netherlands, which was rejected at all instances on the ground that she had not been able to provide consistent information and parts of her asylum account had been considered inconsistent despite the submission of documentary evidence including, *inter alia*, a copy of the hit list naming her stepfather as one of 182 intended victims.

During his military service the husband worked as a prison officer. One of the prisoners, G., was an important member of the Azadibakhshe Baluchistan party. G. persuaded him to smuggle letters out of prison for him. He did so until 19 November 1999, when he learned from another prisoner that G. had been placed in solitary confinement. On 21 November 1999, learning that G. had revealed certain names under torture, the husband deserted. On 23 January 2000 he lodged a request for **asylum** in the Netherlands, which was rejected at all stages on the ground that the asylum account was not credible.
On 12 December 2003 the President of the Chamber to which the case had been allocated indicated to the respondent Government, under Rule 39 of the Rules of Court, that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to deport the applicants to Iran until further notice.

The applicants complained that, as opponents of the current rulers of Iran, they fear inhuman or degrading treatment or punishment if deported. **(Article 3 ECHR)**.

The Court referred to the principles that have been established in the Court's case-law, regarding the violation of Article 3. In the present case the Court considered that neither applicant has submitted any direct documentary evidence proving that they themselves are wanted for any reason by the Iranian authorities. The Court recognised that in cases of this nature such evidence may well be difficult to obtain. However, it was not apparent that any of the information from public sources describing the human rights situation in Iran has any bearing on the personal situation of the applicants. Therefore the Court found that substantial grounds had not been established for believing that either applicant would be exposed to a real risk of violation of Article 3 if compelled to return to Iran. The Court ruled that the **application was manifestly ill-founded and thus inadmissible under Article 3 ECHR**.

♦ ***Haliti v. Switzerland*, Decision of 1 March 2005, Appl. No. 14015/02**

- *State obligation to strike a fair balance between the general interest and the applicants' interest*
- *Article 8 (right to private and family life); Article 13(right to an effective remedy)*

The applicant is a **Serbia-Montenegro national**. On 20 November 1996 he was recognized as refugee. He married and had three children. In 1999 the applicant went to Kosovo. In a decision of 6 July 2001 the applicant was prohibited to re-enter Switzerland for an unlimited

period. On 12 July 2001 the recognition as refugee was withdrawn. The applicant appealed against both decisions. In the proceedings it was established that the applicant had been active in organisations likely to endanger the situation in Kosovo and that he had contact with criminal organisations. It was further held that the applicant had regularly stayed in Albania and Kosovo. It was considered maybe difficult but not insurmountable for his family to stay with him or visit him on a regular base. All appeals were rejected.

The applicant complained that the interdiction to enter Switzerland was a violation of his private and family life under **Article 8 ECHR.** Further he complained that he did not have an effective remedy under **Article 13 ECHR.**

The Court ruled that the interdiction to enter Switzerland is an interference with the applicant's private and family life. The Court examined whether a fair balance has been struck between the general interest of Switzerland and the applicant's interest. It was held that the applicant's contacts with criminal organisations threatened Switzerland's international relations with the country, seeking a peaceful solution for the Balkan. It was further held that there were no insurmountable obstacles to establish family life in Albania or Kosovo. Therefore the complaint under **Article 8 ECHR** was rejected as being **manifestly ill-founded**.
As it was held that the proceedings in Switzerland could be regarded to be effective within the meaning of **Article 13 ECHR** the complaint under this provision was rejected as being **manifestly ill-founded**. Therefore the complaint was declared **inadmissible**.

♦ ***Headley v. the United kingdom*, Decision of 1 March 2005, Appl. No. 39642/03**

- *Alleged violation not substantiated, State obligation to strike a fair balance between the general interest and the applicants' interest*
- *Article 2 (right to life)*
- *Article 8 (right to respect for family life)*

The applicants, father and son, are **Jamaican nationals**. The first applicant claims that he ran a successful enterprise in Jamaica which drew the attention of gangs. When he refused to continue sharing profits with a gang in August 1993 the first applicant was shot at and had to be treated in a hospital. In October 1993 gang members shot at the applicant and his girlfriend (mother of the second applicant). The first applicant was readmitted to a hospital, his girlfriend died. In January 1994 the first applicant entered the United Kingdom on a six months medical visa, which was extended until August 1995. On the basis of a marriage in June 1995 the first applicant was granted leave to remain for twelve months in 1996. The marriage broke down and he started a relationship with C. In May 1998 the applicant was joined from Jamaica by his son, the second applicant, who was born on 2 November 1991. Upon arrival in the United Kingdom the second applicant was given six months' extended leave to remain.
On 31 January 2000 the first applicant was convicted for a drugs related criminal offence and sentenced to seven years imprisonment. Since the first applicant had three previous convictions, each involving violence, a deportation order was made against him on 13 February 2002. His appeal against this decision as well as his **asylum claim**, were rejected. The first applicant returned to prison, in June 2004, being under suspicion of new criminal facts (violence against C.). The second applicant moved in with C's brother and his family. The family has indicated that the second applicant could stay there. The Government has not yet made any decision concerning the possible removal of the second applicant.

The first applicant complained under **Article 2 ECHR** that if he would deported to Jamaica his life will be at risk. Both applicants complain under **Article 8 ECHR** that the first applicant's deportation would amount to a disproportionate interference with their right to respect for their family life.

The Court held that it was not substantiated that the gang members would still want to target the first applicant now or that, if they did, he would be at substantially more risk in Jamaica than in the United Kingdom. The facts that the first applicant did not claim asylum in the United Kingdom until February 2002, and that he took the risk of becoming involved in the importation of illegal drugs at a time when his residence status in the United Kingdom was precarious, further suggest that he himself did not take very seriously the danger to his life which he claims he will face if deported. Therefore it was held that the first applicant did not face a real risk of being killed. The Court ruled that the present case discloses no appearance of a violation of **Article 2 ECHR** on its facts and that it must be rejected as **manifestly ill-founded**.

Regarding the complaint under **Article 8** the Court does not find any exceptional circumstances to suggest that the bond of "family life" between the two applicants has been broken. The Court considered that the deportation order against the first applicant struck a fair balance between the applicant's right to respect for his family life and the prevention of disorder or crime. It was held that the first applicant's offence constituted a serious breach of public order and that he has been convicted of three other offences, each involving violence, in the relatively short time that he has been at liberty in the United Kingdom. Unless and until the Government makes a decision to remove the second applicant, it appears that he will be able to continue living in the United Kingdom with another family. Even if the second applicant would prefer to live with his father, Article 8 does not guarantee a right to choose the most suitable place to develop family life. The Court considered that the applicants have not shown insurmountable obstacles to their being able to maintain family life in Jamaica.
The Court ruled that the complaint under **Article 8 ECHR** must be rejected as **manifestly ill-founded**. Therefore the complaint is declared to be **inadmissible.**

♦ ***Hussein Mossie v. Sweden*, Decision of 8 March 2005, Appl. No. 15017/03**

- *General situation in the country of origin not amounting to real risk under Article 3. (prohibition of torture)*
- *Article 8 (right to respect for family life)*

The first applicant is a **national** of the **Democratic Republic of Congo**. The other applicants are his former wife and their two children, all **Swedish nationals** and his son from an earlier relation, who holds the same nationality as his father. The first applicant belongs to the Banyamulenge. In 1985 he fled to Tanzania because he was a member of an illegal political party in the DRC. In August 1989, he went to Sweden where, in April 1991, the Immigration Board rejected his **application for asylum** but granted him a permanent residence permit based on the situation in the DRC combined with the applicant's personal situation. In September 1991 the first applicant married the second applicant in Tanzania. She was granted a permanent residence permit in Sweden. In May 1996, the family was joined by the first applicant's son. In June 1999, upon arrival in Sweden, the first applicant was checked by customs officers and heroin was found. In November 1999 he was convicted and sentenced to six and a half years' imprisonment and expulsion from Sweden with a prohibition on returning before 1 January 2015. In 2002 and 2003 the applicants' requests to revoke the expulsion order were rejected. On 16 October 2003 the applicant was expelled to the DRC.

The applicants complained under **Article 8 ECHR** that the first applicant's expulsion from Sweden to the DRC violated their right to respect for their family life. The first applicant also claimed under **Article 3 ECHR** that he would risk being tortured or killed in the DRC because he belongs to the Banyamulenge.

The Court noted that the first applicant only invoked the general situation in the DRC and the fact that he belongs to an ethnic minority to substantiate the risk of ill-treatment in the DRC. The Court considered that the general situation in the country is not such that it can be established that the first applicant faced a real risk of being ill-treated in the DRC in contravention of **Article 3 ECHR**. Therefore this part of the application is held to be **manifestly ill-founded**.

Given the circumstances, the Court considered that the expulsion order struck a fair balance between the applicants' right to respect for their family life and the prevention of disorder or crime and the protection of health and morals. The Court noted that, in addition to the main condemnation, the applicant was convicted of several lesser offences and that it was possible for the family to resettle in Tanzania or, in any event, to occasionally visit the first applicant, whether in the DRC or in Tanzania. Therefore the complaint under **Article 8 ECHR** was held to be **manifestly ill-founded** and declared **inadmissible**.

♦ ***Gordyeyev v. Poland*, Decision of 3 May 2005, Appl. No. 43369/98**

- *Protection against arbitrary detention pending deportation, obligations of the State in terms of due diligence and speedy decisions*
- *Article 3 (prohibition of torture)*
- *Article 5 § 1 c and f, § 3(right to liberty and security)*
- *Article 6 (right to a fair trial)*
- *Article 8 (right to respect for private life)*

The applicant is a **Belarusian national**. On the basis of charges of forgery of documents by the Prosecutor of the Republic of Belarus, he was extradited from Poland in 2000 despite several requests to be released and appeals against the extradition decision. On 9 September 1997 the applicant, while in detention pending extradition, applied for **asylum**. He submitted that as a member of a Belarusian dissident organisation, i.e. the People's Belarusian Front "Restitution" he risked to be ill treated by the State authorities. He further alleged that the charges against him were based on entrapment by a former officer of the KGB. The application was rejected at all instances.

The applicant complained under **Articles 5 § 1 (c) and 5 § 1 (f) ECHR** that his detention was unlawful because it lacked a legal basis under Polish law and was based on an incomplete request for his extradition to Belarus, which had not been supplemented in due time. He also alleged that the Polish authorities had failed to show diligence in handling the extradition proceedings.

The Court observed that the applicant's detention had a valid legal basis. The Court did not find the interpretation of the applicable provisions of the domestic law to be unreasonable or arbitrary or otherwise contrary to the applicant's rights under **Article 5 § 1 (f) ECHR**. The Court further noted that while already in detention pending extradition, the applicant applied for asylum. Having regard to the issue to be determined in the asylum proceedings the Court considered that it was neither in the interests of the applicant nor in the general public interest

in the administration of justice that such decisions should be taken hastily, without due regard to all the relevant issues and evidence.

The Court observed that the extradition proceedings were linked with the determination of the asylum claim. The Court considers that the applicant should have been aware that by bringing his asylum claim he might contribute to the length of the extradition proceedings. The Court noted that once the asylum proceedings were terminated, the issue of the applicant's extradition was determined without any significant delay. The Court found that the extradition proceedings do not disclose any lack of due diligence on the part of the domestic authorities such as to render the applicant's detention pending extradition in breach of **Article 5 § 1 (f) ECHR**. Therefore the complaint is held to be **manifestly ill-founded**.

The applicant complained under **Article 5 § 3 ECHR** that his detention had exceeded a "reasonable time". The Court observed that this provision only applies to the form of deprivation of liberty, which is "effected for the purpose of bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence or fleeing after having done so". It further noted that since the Polish authorities detained the applicant "with a view to extradition", **Article 5 § 3 was inapplicable**. It follows that this complaint is **incompatible *ratione materiae***.

The applicant further submitted that surrendering him to the Belarusian authorities would entail a breach of **Article 3 ECHR**. The Court found that the applicant has not shown that he would run a real and serious risk of being subjected to treatment contrary to Article 3 if extradited. It follows that this complaint is **manifestly ill-founded.**

The applicant alleged a breach of **Article 6 § 1 ECHR** in that, given his previous political activity in Belarus and the general situation in that country, there was a high risk that, if extradited, he would be denied a fair trial.

The Court did not elaborate on this question because it found that he has failed to adduce any *prima facie* evidence to demonstrate even the mere likelihood of this happening in his case. Therefore the complaint is held to be **manifestly ill-founded.**
The applicant alleged a violation of **Article 8 ECHR** in that during his detention the Polish authorities had opened and intercepted letters addressed to him. The Court observed that the application was not substantiated and therefore **manifestly ill-founded**. The Court declared the complaint **inadmissible**.

♦ ***Ovdienko v. Switzerland*, Decision of 31 May 2005, Appl. No. 1383/04**
- *Expulsion to a country lacking adequate medical facilities*
- *Article 3 (prohibition of torture)*

The applicants, mother and son, are **Ukrainian nationals**. The first applicant is of **Russian origin**. She owned a private plastic surgery clinic with her husband in Ukraine. She alleged that in 1999 they were harassed by the authorities and subsequently forced to close down the clinic. She claims that she was assaulted in January 1999 and her son was assaulted in November 1999 and kidnapped and raped in December 2000. Despite a number of attempts to get protection from Ukrainian authorities, the General Prosecutor's office discontinued the investigation of the criminal case concerning the second applicant. In June 2001 the applicants arrived in Finland and applied for **asylum**. The mother alleged that the house of her husband's parents was burned down and that the husband was murdered at the end of 2001, allegedly by the mafia. The applicant's applications for asylum were rejected.

According to a medical certificate of 1 September 2003, the son was diagnosed with post-traumatic stress syndrome and psychotic depression and he was considered a severe suicide risk. He was treated in a closed youth psychiatric ward. He was admitted into compulsory health care on 14 November 2003.

The applicants complained under **Article 3 ECHR** that their removal from Finland to Ukraine would interrupt the necessary psychiatric treatment of the second applicant and affect his mental health to such an extent that the risk of suicide could materialise. The applicants further referred to their previous problems in their home country and claimed that the Ukrainian authorities could not and would not protect them sufficiently.

The Court accepts the seriousness of the second applicant's medical condition. However, the Court noted that the applicants' claim that the second applicant has been mentally traumatised by experiences in Ukraine has not been substantiated. The Court found that it has not been shown that the second applicant would not receive adequate care in Ukraine. While the Court acknowledges that the removal decision may have caused the second applicant mental stress, the Court does not find that the applicant's removal would be in violation of Article 3 since it does not reach the high threshold of this article.. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom*[12]. The Court found **no violation Article 3 ECHR.**

As to the complaint under **Article 3 ECHR** with regard to the applicant's previous problems in the Ukraine, the Court calls into question the general credibility of the statements made by the applicants before the Finnish authorities. The Court found the complaint under **Article 3 ECHR manifestly ill-founded**. The application is declared **inadmissible**.

C. Cases adjourned

♦ ***Svetlorusov v. Ukraine*, Decision of 31 May 2005, Appl. No. 2929/05**

- *Risk of violation of Article 3 ECHR (prohibition of torture) in case of deportation*
- *Alleged violation of Article 5 ECHR (right to liberty and security) with respect to arrest and detention with a view to extradition*
- *Article 6 (right to a fair trial)*

The applicant is a **Belarusian national,** suspected of fraud. On 29 December 2004 the applicant was arrested and detained in Ukraine, with a view to be extradited to Belarus. The applicant lodged several appeals against this decision, which were rejected. It had only been established that his detention as from 29 December 2004 until 11 January 2005 had been illegal. On 20 January 2005 he requested the Court to apply Rule 39 with a view to not be extradited to Belarusian. The President of the chamber decided to apply Rule 39. On 21 February 2005 the applicant applied for **asylum** in Ukraine.

The applicant complained that his extradition would be in breach of **Article 3 ECHR,** due to the risk of maltreatment. Under the same provision he complained about the Ukrainian proceedings regarding his extradition.
Under **Article 5 §§ 1f, 3 and 5 ECHR** the applicant complained about illegal detention, the lack of prompt judicial review and the lack of a possibility to be compensated.

[12] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 4.1 – Selected Case Law on Article 3, p. 8

Relying on **Article 5 § 2 ECHR** the applicant complained that he was not informed properly of the reasons of his arrest. With reference to the documents on the file the Court held this part of the complaint to be **manifestly ill-founded.**
Under Article 5 § 4 ECHR the applicant complained that he was not brought before a court speedily. The Court held this complaint to be **partly manifestly ill-founded** and **adjourned** a decision for the remaining.
Invoking **Article 6 § 1 ECHR** the applicant complained that the Belarusian authorities ignore the presumption of innocence and that he will not have a fair trial; **decision adjourned**
The Court decided that the examination of the complaints under **Articles 3, 5 § 1 f, 4, 5 and 6 § 1 be adjourned** and declared **inadmissible** the complaint for the **remaining.**

D. Cases struck off the list

No cases relevant to the international protection of refugees.

E. Friendly settlements

No cases relevant to the international protection of refugees.

F. Applications communicated to governments

No cases relevant to the international protection of refugees.

G. Rule 39 of the Rules of the Court – Interim measures

In the first half of 2005, 24 requests for Rule 39 interim measures were granted, of which 15 cases against Sweden:

Application Number	Title	Date of interim measure	Country of destination (if applicable)
44922/04	KELJMENDI v. FYRO Macedonia	11 Jan 2005	Kosovo
547/05	SVARCA v. Sweden	12 Jan 2005	Kosovo
2929/05	SVETLORUSOV v. Ukraine	21 Jan 2005	Belarus
3477/05	AIDO ALI v. Romania	31 Jan 2005	Turkey
17837/04	GULER v. Turkey and Switzerland	31 Jan 2005	-
4023/05	SHABAZOVA v. Russia	1 Feb 2005	-
3418/05	AFIFY v. the Netherlands	2 Feb 2005	Egypt
4144/05	KOHINUR and others v. Sweden	3 Feb 2005	Bangladesh
4244/05	ELEZI v. Sweden	4 Feb 2005	FYRO Macedonia

4701/05	AYEGH v. Sweden	4 Feb 2005	Iran
5212/05	KHALILOV and others v. Sweden	10 Feb 2005	Azerbaijan
5607/05	RAGIMOVA and others v. Sweden	14 Feb 2005	Azerbaijan
5145/05	SEMJONOV v. Sweden	16 Feb 2005	Kyrgyzstan
6339/05	EVANS v. the United Kingdom	22 Feb 2005	-
6607/05	MOJSIJEVIC v. Sweden	28 Feb 2005	Serbia and Montenegro
7260/05	MULIIRA v. Sweden	1 Mar 2005	Uganda
8628/05	RRUSTEMAJ v. Sweden	15 Mar 2005	Serbia and Montenegro
9886/05	AHMED v. Sweden	24 Mar 2005	Kenya or Somalia
11665/05	HASANOVA v. Sweden	5 Apr 2005	Uzbekistan
16348/05	MOSTAFA and others v. Turkey	4 May 2005	Iraq
17276/05	OKUBAY v. Sweden	26 May 2005	Eritrea
17185/04	SHLOUN v. Sweden	31 May 2005	Areas under Palestinian Government
22556/05	MABROKI v. Sweden	21 Jun 2005	Tunisia
23254/05	ESMAILI v. the Netherlands	29 Jun 2005	Iran

3. Supervision of execution of Judgements by the Committee of Ministers

With regard to the judgment of the Court on 8 July 2004 in the case of *Ilasçu and others v. the Russia Federation and Moldova*[13] the Committee of Ministers adopted on 22 April 2005 Interim Resolution ResDH (2005)42, inviting Moldova to continue its efforts towards securing the release of the two applicants who are still unlawfully and arbitrarily detained on their territory and inviting Russia to comply fully with the judgment.

4. Other news

On 26 January 2005 the Parliamentary Assembly of the Council of Europe elected Mr. Dragoljub Popovic as judge in respect of Serbia and Montenegro and elected on 27 April 2005 Ms. Ineta Ziemele as judge in respect of Latvia.

[13] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 5.*8 – Summaries of Judgments and Admissibility Decisions (July-December 2004)*, p. 1

Protocol No. 12 (prohibition of discrimination) to the ECHR has been ratified by Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, the Netherlands, San Marino, Serbia and Montenegro and Macedonia and entered into force on 1 April 2005.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.10 – Summaries of Judgments and Admissibility Decisions (July – December 2005)

1. Court Judgments

♦ ***Said v. the Netherlands*, Final judgment of 5 July 2005, Appl. No. 2345/02**

- *Protection against refoulement of a deserter, particular consideration by the Court to the general situation of deserters in the country of origin*
- *No violation of Article 2 (right to life)*
- *Violation of Article 3 (prohibition of torture or inhuman or degrading treatment)*

The case was declared admissible on 5 October 2004.[1]

Facts:
The applicant is an **Eritrean national**. On 8 May 2001 he arrived in the Netherlands and applied for **asylum**. He submitted that he served as a soldier and fought in the war against Ethiopia. Although the war ended on 13 June 2000, the troops were not demobilized immediately because the Eritrean authorities feared further military incursions from the Ethiopians.
The applicant fled to Sudan and subsequently to the Netherlands after he was detained in an underground cell for almost five months without prosecution.
On 23 May 2001 the applicant's request and appeal for asylum were rejected. His failure to submit any document capable of establishing his identity, his nationality or his travel itinerary was held to affect the credibility of his statements. It was also considered that the applicant's account of his alleged escape was implausible.

Complaint before the Court:
The applicant complained under **Articles 2 and 3 ECHR** that his expulsion to Eritrea would place him at risk of being executed and/or subjected to torture or inhuman or degrading treatment.

Legal Argumentation:
The Court held that the applicant's statements had been consistent and were corroborated by Amnesty International. Even though the material submitted was of a general nature, it was difficult to see what additional evidence the applicant could reasonably have been expected to produce in support of his version of events. In this vein, the Court recalls that it is:

> "*incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, **to the greatest extent practically possible**, material and information allowing (…) the Court to assess the risk a removal may entail*" (para. 49)

In its assessment of the general credibility of the statements of the applicant, the Court held that there was strong indication that the applicant was a deserter since he applied for asylum in the

[1] See *UNHCR Manual on Refugee Protection and the ECHR – Update July-December 2004*, p. 9.

Netherlands in May 2001, at a time when demobilisation had not yet begun and would not begin for another year.
In this context, the Court noted that it was difficult to imagine by what means other than desertion the applicant might have left the army.
In its assessment of the risk of ill treatment for the applicant if returned to Eritrea, the Court took further note, among other things, of reports from Amnesty International describing the ill-treatment of deserters in Eritrea, which, in the Court's view, constituted inhuman treatments[2]. Given that the applicant had already been arrested and detained by Eritrean military authorities and that he was known to the authorities, the Court found that substantial grounds had been shown for believing that, if expelled, the applicant would be exposed to a real risk of being subjected to ill-treatment in **violation of Article 3 ECHR**.

In the light of its finding under Article 3, the Court considered that no separate issue arose under Article 2.

♦ ***Üner v. the Netherlands*, Judgment of 5 July 2005, Appl. No. 46410/99**

- *Balancing the general interest of the state to protect public order and the right to family life of a migrant in an expulsion case*
- *No violation of Article 8 (right to respect for private and family life)*

This case was referred to the Grand Chamber in accordance with Articje 43 ECHR[3].

Facts:
The applicant is a **Turkish national**. He came to the Netherlands with his mother and two brothers in 1981, when he was 12 years old, to join his father. He obtained a permanent residence permit in 1988. In or around June 1991 the applicant started living with a Netherlands national. The couple had a son, born on 4 February 1992. The applicant moved out in November 1992, but remained in close contact with both his partner and his son. In January 1994 he was convicted of manslaughter and assault and sentenced to seven years' imprisonment. His partner and son visited him in prison at least once a week and regularly more often. A second son was born to the applicant and his partner on 26 June 1996, whom he also saw every week. Both his children have Netherlands nationality and have been recognized by the applicant. Neither his partner nor his children speak Turkish.

By decision of 30 January 1997, the applicant's permanent residence permit was withdrawn and a ten-year exclusion order was imposed on him in view of his conviction of 21 January 1994. He

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[2] In this case, the Court paid particular attention to the general materials describing the situation of deserters in Eritrea to conclude that as a deserter already detained by the authorities, the applicant faced a risk of ill-treatment.
[3] Under Art. 43 ECHR, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

appealed unsuccessfully. The applicant was deported to Turkey on 11 February 1998. However, it appeared that he returned to the Netherlands soon afterwards and was once more deported to Turkey on 4 June 1998. He again appealed unsuccessfully.

Complaint before the Court:
The applicant complained under **Article 8 ECHR** that, as a result of the withdrawal of his residence permit and the imposition of a ten-year exclusion order, he had been separated from his wife and two children.

Legal Argumentation:
The Court found that the expulsion order against the applicant constituted an interference with the applicant's right to respect for his family life, which was in accordance with Netherlands law and pursued legitimate aims, namely public safety and the prevention of disorder or crime.

Given the seriousness of the offence and that it was not his first conviction, the Court was satisfied that there was a legitimate basis for assuming that the applicant constituted a danger to public order and security. This statement was not mitigated by any information relating to the applicant's behavior following his release.
In addition the Court held that despite the fact that the applicant had been legally residing in the Netherlands for 16 years, there was no indication that he would no longer be able to settle in Turkey, where he spent the first 12 years of his life. Neither were any insurmountable obstacles for his partner and their children, who were still of an adaptable age. Finally, they had not been living together as a family and the exclusion order was not of unlimited duration. In these circumstances, the Court held that the exclusion order was proportionate and there had been **no violation of Article 8**.

♦ ***Moldovan and others v. Romania*, Final judgment of 12 July 2005, Appl. Nos. 41138/98 and 64320/01**

- *Ill-treatment of Roma and destruction of Roma properties involving Romanian officials*
- *Violation of Article 3 (prohibition of torture)*
- *Violation of Article 6 § 1 (access to court)*
- *Violation of Article 6 § 1(Right to a fair hearing within a reasonable time)*
- *Violation of Article 8 (right to respect for their family and private life)*
- *Violation of Article 14 (prohibition of discrimination)*

Facts:
The case originally involved 25 applicants, of whom 18 agreed to a friendly settlement (see *Moldovan and Others v. Romania (no. 1)*, judgment of 5 July 2005). In 1993, a row broke out between three Roma men and a non-Roma villager wherein the villager's son, was stabbed in the chest by one of the Roma men. The Roma men fled to a nearby house. A large, angry crowd gathered outside, including the local police commander and several officers. The house was set on fire. Two of the Roma men managed to escape from the house, but were pursued by the crowd and beaten to death. The third man was prevented from leaving the building and burnt to death. The applicants submitted that the police had encouraged the crowd to destroy more Roma property in the village. By the following day, 13 Roma houses had been completely destroyed,

including the homes and personal property of the applicants. Several applicants submitted that they were victim of acts of violence by police and villagers.
The Roma residents of the village lodged a criminal complaint against those allegedly responsible, including six police officers. In 1995 all charges against the police officers were dropped. In 1997 a criminal trial, in conjunction with a civil case for damages, began against 11 villagers allegedly involved in the events. The court established that the villagers, with the authorities' support, had set out to have the village "purged of Gypsies". In its judgment the county court stated, *inter alia*, that the Roma community had marginalised itself, shown aggressive behaviour and deliberately denied and violated the legal norms acknowledged by society.

The convictions for the destruction of property and extremely serious murder varied depending on the different instances during the proceedings. In November 1999 the Supreme Court upheld the convictions for the destruction of property but reduced the charge of extremely serious murder to one of serious murder for three of the defendants. In 2000 two of the convicted villagers received a presidential pardon.

The Romanian Government subsequently allocated funds for the reconstruction of the destroyed or damaged houses. However the applicants submitted that, since some of the houses were uninhabitable, they were forced to live in extremely cold and over-crowded conditions, which had lasted for several years and in some cases were still continuing. As a result, many applicants and their families fell seriously ill.

The pecuniary and non pecuniary damages awarded to only some of the applicants were relatively low.

Complaints before the Court:
The applicants complained that, after the destruction of their houses they had to live in very poor conditions, in violation of **Articles 3 and 8 ECHR**.
The applicants complained that the failure of the authorities to carry out an adequate criminal investigation, culminating in formal charges and the conviction of all individuals responsible, had denied them access to court for a civil action in damages against the State regarding the misconduct of the police officers concerned. Several applicants also complained under **Article 6 § 1 ECHR** that, owing to the length of the criminal proceedings, the civil proceedings had not yet ended. The applicants complained under **Article 14 ECHR** that, on account of their ethnicity, they were victims of discrimination.

Legal Argumentation:
The Court could not examine the complaints about the destruction of houses and possessions or the applicant's expulsion from their village as those events had taken place before the ratification of the Convention by Romania in 1994. However, it was clear that police officers had been involved in the burning of the Roma houses and had tried to cover up the incident. The applicants had been obliged to live in unsuitable conditions. Having regard to the direct repercussions of the acts of State agents on the applicants' rights, the Court held that the Government's responsibility was engaged with regard to the applicants' living conditions. The question of those conditions fell within the scope of the applicants' right to respect for their family and private life as well as for their homes.

The Court made the following findings:

- Despite the involvement of State agents in the burning of the applicants' houses the Public Prosecutors' Office had failed to institute criminal proceedings against them, preventing the domestic courts from establishing the responsibility of those officials and punishing them;
- The domestic courts had refused for many years to award pecuniary damages for the destruction of the applicants' belongings and furniture;
- Only ten years after the events had compensation been awarded for the destroyed houses, though not for the loss of belongings;
- In the judgment in the criminal case against the accused villagers, discriminatory remarks about the applicants' Roma origin had been made;
- The applicants' requests for non-pecuniary damages had been rejected at first instance;
- The regional court had decided to award only half of the maintenance allowance for a widow's minor child on the ground that the deceased victims had provoked the crimes;
- Three houses had not been rebuilt by the authorities and those which supposedly had been rebuilt remained uninhabitable;
- Most of the applicants had not returned to their village and were scattered throughout Romania and Europe.

The Court considered that "*the above elements taken together disclose* ***a general attitude of the authorities****, which perpetuated the applicants' feelings of insecurity after June 1994 and constituted in itself a hindrance of the applicants' rights to respect for their private and family life and their homes*" (para. 104). That attitude, and the repeated failure of the authorities to put a stop to the breaches of the applicants' rights, amounted to a serious **violation of Article 8** of a continuing nature.

The Court considered that the applicants' living conditions over the last ten years, and its detrimental effect on their health and well-being, combined, inter alia, with the general attitude of the authorities, must have caused them considerable mental suffering. The applicants' living conditions and the racial discrimination to which they had been publicly subjected by the way in which their grievances had been dealt with by the various authorities had amounted to "degrading treatment" within the meaning of Article 3. The Court found a **violation of Article 3 ECHR**.

It had not been shown that it had been possible for the applicants to bring an effective civil action for damages against the police officers in the particular circumstances of the case. However, the applicants lodged a civil action against the civilians who had been found guilty by the criminal court, claiming compensation for the destruction of their homes. That claim was successful and effective, the applicants having been granted compensation. In those circumstances, the Court considered that the applicants could not claim an additional right to a separate civil action against the police officers allegedly involved in the same incident. The Court found no **violation of Article 6 § 1 ECHR** (Access to the court).

The period under consideration had lasted more than 11 years. The Court found a **violation of Article 6 § 1 ECHR** (Right to a fair hearing in a reasonable time).

Whilst not able to examine the actual burning of the applicants' houses and the killings, the Court observed that the applicants' Roma ethnicity appeared to have been decisive for the length and the result of the domestic proceedings. It took particular note of the repeated discriminatory remarks made by the authorities throughout the whole case and their blank refusal until 2004 to

award non-pecuniary damages for the destruction of the family homes. The Court therefore found a **violation of Article 14 ECHR** taken in conjunction with Art. 6 and 8 ECHR.

♦ ***Siliadin v. France*, Final judgment of 26 July 2005, Appl. No. 73316/01**

- *French criminal law deficient to protect foreigners against modern servitude*
- *Violation of Article 4 (prohibition of servitude)*

Facts:
The applicant is a **Togolese national** who lives in Paris. In January 1994 she, arrived in France at the age of fifteen years old with a French national of Togolese origin, Mrs D. The latter had undertaken to regularize the applicant's immigration status and to arrange for her education, while the applicant was to do housework for Mrs. D. until she had earned enough to pay her back for her air ticket. The applicant effectively became an unpaid servant to Mr. and Mrs. D. and her passport was confiscated.
In October 1994 Mrs. D. "lent" the applicant to a couple of friends, Mr. and Mrs. B. She was supposed to stay for only a few days but Mrs. B. decided to keep her. She became a "maid of all work" to the couple, working 7 days a week as from 7.30 a.m. until 10.30 p.m. without payment nor days off. The applicant slept on a mattress on the floor and wore old clothes.
In July 1998 the applicant confided in a neighbor, who informed the Committee against Modern Slavery, which reported the matter to the prosecuting authorities. Criminal proceedings were brought against Mr. and Mrs. B. At first instance they were convicted and sentenced but were acquitted in appeal. In a judgment of 15 May 2003 the Versailles Court of Appeal, found Mr. and Mrs. B. guilty of making the applicant work unpaid for them but considered that her working and living conditions were not incompatible with human dignity. Accordingly the court ordered them to pay the applicant the equivalent of € 15,245 in damages. In October 2003 an employment tribunal awarded the applicant a sum that included € 31,238 in salary arrears.

Complaint before the Court:
Relying on **Article 4 ECHR**, the applicant complained that French criminal law did not afford her sufficient and effective protection against the "servitude" in which she had been held, or at the very least against the "forced and compulsory" labor she had been required to perform, which in practice had made her a domestic slave.

Legal Argumentation:
The Court considered that Article 4 ECHR was one of those Convention provisions which gave rise to positive obligations on States. The Court therefore held that States were under an obligation to penalize and punish any act aimed at maintaining a person in a situation incompatible with Article 4.
The Court further considered that the Parliamentary Assembly of the Council of Europe had pointed out that "domestic slavery" persisted in Europe and concerned thousands of people, the majority of whom were women. With regard to the circumstances in this case, the Court held that the applicant had been subjected to forced labor within the meaning of Article 4 ECHR.

The Court then determined whether the applicant had also been held in slavery or servitude.
Although she had been deprived of her personal autonomy, it was held that she had not been held in **slavery** in the proper sense, in other words that Mr. and Mrs. B. had exercised a genuine right of ownership over her. The Court defined the servitude within the meaning of Article 4 ECHR as

an obligation to provide one's services under coercion and found that the applicant had been held subject to such a treatment.

The Court held that the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the above treatments. Consequently, the Court held that there had been **a violation** of **Article 4 ECHR**.

♦ ***N. v. Finland*, Final judgment of 26 July 2005, Appl. No. 38885/02**

- *Protection against refoulement to DRC for a former member of Mobutu's special protection force*
- *Violation of Article 3 (prohibition of torture)*

Facts:
The applicant arrived in Finland in 1998 and applied for **asylum**, stating that he had left the Democratic Republic of Congo ("the DRC") in May 1997, when Kabila's rebel troops had seized the power from President Mobutu. He submitted that his life was in danger in the DRC on account of his having belonged to the President's inner circle, notably by forming part of his special protection force. In 2001 the Directorate of Immigration ordered the applicant's expulsion, having found his account not credible and considering that he had failed to prove his identity. In 2002 the Administrative Court refused the applicant's appeal, noting that he had been appearing under different names, *inter alia* as an asylum seeker in the Netherlands in 1993 and not being convinced of his credibility. In 2003 the Supreme Administrative Court rejected his further appeal, noting doubts on his true identity and ethnic origin and his whereabouts between his expulsion from the Netherlands in 1995 and his arrival in Finland in 1998.

Complaint before the Court
The applicant complained that his expulsion to DRC would be in breach of Article 3 ECHR.

Legal Argumentation
In order to assess the applicant's credibility two Delegates of the Court took oral evidence from the applicant himself, his common-law wife, K.K. (another refugee from the DRC) and a senior official in the Directorate of Immigration. The Court found K.K. to be a credible witness whose testimony clearly supported the applicant's own account. While retaining doubts about the credibility of some of the applicant's testimony, the Court found that his account on the whole had to be considered sufficiently consistent and credible.

As to the risk of treatment contrary to Article 3, the Court noted that as the applicant had left the DRC eight years ago it could not be excluded that the current DRC authorities' interest in detaining and possibly ill-treating him due to his past activities may have diminished. The Court referred to a large number of UNHCR papers (paras. 117-121) highlighting, in respect of former army members, that factors other than rank – such as the soldier's ethnicity or connections to influential persons – could also be of importance when considering the risk he or she might be facing if returned to the DRC (para. 161). Decisive regard was given to the applicant's specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President. In this context, the Court noted that the risk of ill-treatment might not necessarily emanate from the current authorities but from relatives of dissidents who may seek revenge on him. The Court held that the authorities

would not necessarily be able or willing to protect him against these threads. The Court therefore found a **violation of Article 3 ECHR**.

♦ ***Mogos v. Romania,*** **Judgment of 13 October 2005, Appl. No. 20420/02**

- *Return of stateless persons from Germany to Romania*
- *No violation of Article 3 ECHR (prohibition of torture)*
- *No violation of Article 34 ECHR (individual applications)*

The case was declared admissible on 6 May 2004.[4]

Facts:
The applicants, a couple and their five children, are **stateless persons of Romanian origin.**[5] In 1990, they left Romania for Germany where they sought **asylum** claiming that being **Roma** they faced persecution. In 1993, they **renounced their Romanian nationality**. Their **application for asylum**, as well as their attempts to obtain residence permits in Germany were rejected at all stages of the procedure. On 7 March 2002, the applicants (with the exception of the first two children, who were married to German nationals) were **expelled** to Romania, notably pursuant to an **agreement concluded between the two States in 1998**, whereby Romania declared that it was prepared to accept its former national who had become stateless persons. Upon their arrival, the applicants alleged that they were arrested by the police and ill treated before being transferred to the transit centre. The applicants also claimed that on 1 April 2002, as they (except their youngest child) intended to help another stateless person being ill-treated by a number of policemen in the room next to their, they were assaulted by the policemen. These facts are contested by the respondent government.

Complaint before the Court:
The applicants complained that on 1 April 2002 they were subjected to ill-treatment in violation of **Article 3 ECHR**. They further complained that their living conditions in the transit centre constituted a violation of **Article 3 ECHR**. Invoking **Article 34 ECHR** they complained that their communication with the Court was hindered by the authorities.

Legal Argumentation:
As to the events on 1 April 2002 the Court held that the applicants had not substantiated their complaints with regard to the ill-treatment by the police. It further held that, even assuming that the police used force, this force was proportionate in the circumstances of the case.
As to the living conditions the Court established that the applicants voluntarily refused to leave the centre to enter Romania. It was further established that the applicants refused medical treatment in a hospital. The Court therefore found **no violation of article 3 ECHR**.

The Court found that the applicants had not substantiated their complaint that letters were withheld or delayed and that the Romania authorities took notice of the contents and therefore found **no violation of Article 34 ECHR.**

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[4] See *UNHCR Manual on Refugee Protection and the ECHR – Update January-June 2004*, p. 10.
[5] For the part of the complaint concerning Germany, see *Mogos and Krifka v. Germany (Appl. No. 78084/01),* Update January-June 2003 of *UNHCR Manual on Refugee Protection and the ECHR*, pp. 5-6.

- ***Niedzwiecki v. Germany*, Final judgment of 25 October 2005, Appl. No. 58453/00**
- ***Okpisz v. Germany*, Final judgment of 25 October 2005, Appl. No. 59140/00**

  - *Discrimination concerning the granting of child benefits between immigrants according to the duration of their residence permits*
  - *Violation of Article 14 ECHR (prohibition of discrimination) in conjunction with Article 8 ECHR (right to respect for private and family life)*

Facts:
The applicants in both cases are immigrants, in possession of residence permits for exceptional purposes. Their requests for child benefits were rejected as they were not in possession of unlimited residence permits or provisional residence permits, as required by law. In the Niedzwiecki case all appeals in the domestic proceedings were rejected. In the Okpisz case the applicant's appeal was suspended after the Social Court of Appeal had referred some pilot cases to the Federal Constitutional Court. In a judgment of 6 July 2004 the Federal Constitutional Court found that the different treatment of parents who were and who were not in possession of a stable residential permit lacked sufficient justification. After that decision, the applicant's appeal was again suspended pending the amendment of the applicable legislation.

Complaint before the Court:
The applicants complained that the German authority's refusal of child benefits amounted to discrimination in violation of **Article 14 ECHR in conjunction with Article 8 ECHR**.

Legal Argumentation:
The Court held that granting child benefits come within the scope of respect for family life as guaranteed in Article 8 ECHR and therefore Article 14 – taken together with Article 8 ECHR – is applicable. The Court found no "objective and reasonable justification" for the applicants to be treated differently (para. 32 of *Niedzwiecki v. Germany* and para. 33 of *Okpisz v. Germany*) Therefore the Court found a violation of **Article 14 ECHR in conjunction with Article 8 ECHR**.

- ***Keles v. Germany*, Final judgment of 27 October 2005, Appl. No. 32231/02**

  - *Balancing the general interest of the state to protect public order and the right to family life of a migrant in an expulsion case*
  - *Violation of Article 8 ECHR (right to respect for private and family life)*

Facts:
In 1972, the applicant, a **Turkish** national, aged ten years, entered Germany to live with his parents and brother. He got married and has four children, all Turkish nationals. In 1983 –in view of previous convictions- he was warned that he would face expulsion if he committed further criminal offences. In January 1999 –after repeated criminal convictions- his unlimited expulsion to Turkey was ordered. On 3 May 1999 he was deported to Turkey. On 21 May 1999 he returned and filed a request to be granted **asylum**. He was again deported on 12 August 2003, after the rejection of his asylum request. On 19 December 2003 he filed a request to set a time-limit on the effects of his deportation. This procedure is still pending.

Complaint before the Court:
The applicant complained that his expulsion to Turkey violated his right to respect for his private and family life as provided in **Article 8 ECHR**.

Legal Argumentation:
The Court held that the expulsion order constituted an interference with the applicant's right to respect for his family life and that this interference was in accordance with the law and pursued legitimate aims, namely public safety and the prevention of disorder or crime. Although the applicant is not a second generation immigrant, the Court applied criteria, similar to those as applied in cases of second generation immigrants to assess whether the interference was "necessary in a democratic society" (see *Boultif v. Switzerland*, no. 54273/00 and *Benhebba v. France*, no. 53441/99, 10 July 2003). Given the circumstances of the case, such as the nature of the offences, the long duration of stay in Germany and the position of the applicant's children, the Court found the unlimited exclusion from Germany to be disproportionate and therefore in **violation of Article 8 ECHR.**

♦ ***Bader v. Sweden*, Judgment of 8 November 2005, Appl. No. 13284/04**

- *Protection against refoulement to a risk of flagrant denial of a fair trial, which may result in death penalty*
- *Violation of Article 2 (right to life)*
- *Violation of Article 3 (prohibition of torture or inhuman or degrading treatment)*

Facts:
The applicants, a married couple and two children, are **Syrian** nationals of Kurdish origin. They applied for **asylum** in Sweden in August 2002. The husband submitted that he had been arrested by the Syrian Security Police in December 1999 and had been imprisoned for nine months and questioned about his brother who had deserted. The asylum application was rejected. In January 2004, the applicants lodged a new asylum application submitting a judgment of 17 November 2003 of the Regional Court of Aleppo (Syria) in which the husband was convicted, *in absentia*, of complicity in the murder of his brother-in-law and sentenced to death. The applicant claimed that he was innocent as he had been in Beirut at the material time. He further submitted that he had been imprisoned in 1999-2000 for nine months on suspicion of this crime. The asylum application was rejected, as it appeared from a report from the Swedish embassy in Syria that, if the husband returned to Syria, it was probable that the case would be re-opened and that death penalty was rarely imposed concerning a 'honour related' crime (para. 23).

Complaint before the Court:
The applicants complained that, if deported to Syria, the husband would run a real risk of being arrested and executed in violation of **Articles 2 and 3 ECHR**.

Legal Argumentation:
The Court recalled that an issue may arise under Articles 2 and 3 ECHR if a "Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty" (para. 41)[6].

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[6] To note, the Court argues that, while Article 2 ECHR does not prohibit the death penalty in all circumstances, the implementation of a death sentence following an unfair trial would amount to arbitrary

The Court noted in the present case, that the report from the Swedish embassy was "vague and imprecise" (para. 45) and only contained assumptions regarding the fate of the applicants if deported to Syria. The Court also highlighted that the Swedish authorities did not obtain a guarantee from Syria that the case will be re-opened and that the public prosecutor will not request death penalty. It was further found that the circumstances surrounding the execution would cause considerable fear and anguish and intolerable uncertainty about the conditions of the execution. It was also found that the first trial should be regarded as a flagrant denial of a fair trial, which would cause the applicants additional fear and anguish. Therefore the Court found a **violation of Articles 2 and 3 ECHR**.

♦ ***Tuquabo-Tekle v. the Netherlands*, Judgment of 1 December 2005, Appl. No. 60665/00**

- *Obligation of the host country to allow family reunion*
- *Violation of Article 8 (right to respect for their family and private life)*

Facts:
The applicant fled from Ethiopia to Norway in 1989, after her husband was killed. Although denied **asylum**, she was granted a residence permit on humanitarian grounds. Her son and her daughter, who remained in Eritrea, were allowed to join her in Norway but only the son managed to come. She married a man in the Netherlands and moved to that country. She had two children with him.
In 1997 she started a procedure to have her daughter come to the Netherlands. Her request was rejected as it was held that the family ties did not longer exist, due to the duration of the separation and the fact that the daughter had integrated in the family of an uncle and her grand mother. It was also argued that after marrying Mr Tuquabo, Mrs Tuquabo-Tekle had started a new family unit in the Netherlands to which her daughter had never belonged.

Complaint before the Court:
The applicant argued that the refusal by the Dutch Government to allow the applicant's daughter to reside with her mother in the Netherlands is in breach of **Article 8 ECHR.**

Legal Argumentation:
The Court had to examine the scope of a State's obligation to admit to its territory relatives of settled immigrants, including, like in the present case, beneficiaries of humanitarian status. This is of particular interest to UNHCR with a view to promote the obligation of the State to facilitate family reunion.

The Court recalled that the scope of the above obligation will have to be assessed according, *inter alia*, to the particular circumstances of the persons involved and the general interest pursued by the concerned state.

In examining whether the respondent state had struck a fair balance between the competing interests of the individual (i.e. family reunion in the Netherlands) and of the community (i.e. immigration control), the Court dismissed the Government arguments:

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deprivation of life, which would be in violation of Article 2 ECHR (para. 41, See also the concurring opinion of Judge Cabral Barreto attached to the judgment).

- Parents leaving their children behind cannot be assumed to have irrevocably decided to have abandoned any idea of a future family reunion as shown by the continuing efforts of the applicant to be joined by her daughter;
- Having fled Ethiopia during the civil war to seek asylum abroad, the applicant could not be considered to have left her daughter "on her own free will" (para. 47);
- In the present circumstances, the advanced age of the applicant's daughter (15 years old) was not a sufficient justification to refuse the family reunion[7].

In light of the above, the Court found a **violation of Article 8**.

2. Court Decisions

A. Cases declared admissible

♦ *Saadi v. the United Kingdom*, Decision of 27 September 2005, Appl. No. 13229/03

- *Detention of asylum seekers to facilitate the examination of the asylum claims*
- *Article 5 (right to liberty)*
- *Article 14 (prohibition of discrimination)*

The applicant is an **Iraqi** national of Kurdish origin. He arrived in the United Kingdom on 30 December 2000 and applied for **asylum**. After his one day temporary admission has been renewed twice, he was detained in Oakington Reception Centre on 2 January 2001. The applicant appealed against the asylum refusal and was released on 9 January. He was granted refugee status in January 2003. The applicant unsuccessfully applied for judicial review of his detention, claiming that it was unlawful under Article 5 ECHR.

To note, the domestic courts disagreed concerning the interpretation of Article 5 § 1(f) ECHR. The first instance judge found that the detention was not compatible with Article 5 § 1(f) ECHR. He argued that this provision required the detention to be necessary to effectively prevent unauthorized entry. It was not so in the present case, given that the applicant had claimed asylum and that there was no risk that he would abscond. The Court of Appeal and the House of Lords held, on contrary, that it did not have to be necessary and that the detention for the purpose of deciding whether to authorize entry was covered by Article 5 § 1(f)[8].

The applicant complained under **Article 5 ECHR** that his detention was disproportionate and arbitrary and that he was not given reasons for his detention. Under **Article 14 ECHR** he complained that his detention was only possible because Kurds from Iraq were on the list of nationalities that could be considered for Oakington.

The above argument of the Court of Appeal and the House of Lords was submitted by the Government before the European Court of Human Rights. On contrary, the applicant maintained,

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[7] It is worth noting that in its assessment of this case, the Court drew a parallel with the case of *Sen v. the Netherlands* of 21 December 2001 (for further details see *UNHCR Manual on refugees Protection and the ECHR Part 5.2 - Update July-December 2001*, p. 3).

[8] For further details on the argumentation of the domestic courts, see **Part A**. of the judgment: **The circumstances of the case**, p. 2.

inter alia, that the detention of an asylum-seeker, who presents no threat to immigration control merely in order to accelerate the decision concerning his/her entry does not equate to "preventing unauthorized entry" as required in Article 5 § 1(f).

The Court considered, in the light of the parties' submissions, that the application was **admissible.**
In challenging the UK policy in Oakington, this case has important bearings regarding, more broadly, the increased use of detention of asylum-seekers in Europe.

B. Cases declared inadmissible

♦ ***Bonger v. the Netherlands*, Decision of 15 September 2005, Appl. No. 10154/04**

- *Article 3 ECHR (prohibition of torture)*

In January 1995 the applicant, an Ethiopian national, applied for **asylum** in the Netherlands. He *inter alia* stated that he had been a pilot in the Ethiopian air force under the Mengistu regime. From July 1992 until January 1993 he stayed in a re-education camp. In March 1993 he went into hiding for fear of being arrested again and subsequently left the country. His request for asylum was rejected. In January 1997 he filed a second request for asylum on the basis of a letter from the Ethiopian authorities, requesting information about him. The Minister of Immigration rejected the request for asylum, holding that the applicant's acts as an air force pilot fell within the scope of Article 1 F of the 1951 Geneva Convention. The applicant's appeal was dismissed as it was held that the applicant had not submitted newly emerged facts or altered circumstances as required by law.

The applicant complained that, if expelled to Ethiopia, he would run a real risk of being subjected to a treatment contrary to **Article 3 ECHR**. He further complained that the refusal of the Regional Court to examine his second asylum application was in violation of **Article 13 ECHR.**

The Netherlands' Government submitted that for the time being they had no intention to effectively expel the applicant to Ethiopia and in the event of actual expulsion, the applicant could challenge his expulsion in administrative appeal proceedings.
The applicant submitted that the rejection of his asylum request constituted in fact an order for his expulsion and that the administrative proceedings do not provide for an effective remedy.
The Court found that in the absence of any realistic prospects for his expulsion, the applicant **cannot claim to be a victim under Article 34 ECHR**. With regard to Article 13 ECHR the Court found that, in the eventuality of an act aimed at his effective expulsion, the administrative appeal proceeding provide an effective remedy to determine whether deportation to Ethiopia would be in violation of Article 3 ECHR. Therefore the Court found the application manifestly unfounded and therefore **inadmissible**.

♦ ***Kaldik v. Germany*, Decision of 22 September 2005, Appl. No. 28526/05**

- *Article 3 ECHR (prohibition of torture)*
- *Article 13 ECHR (right to an effective remedy)*

The applicant is a **Turkish** national. She applied for **asylum** in Germany in July 2002. She *inter alia* submitted that she was raped by Turkish soldiers who were looking for her husband. She further submitted that men from her village had urged her father (who had helped her to escape) to kill her in order to restore the honor of the family. She submitted medical reports, which stated, *inter alia*, the risk of an aggravation of her illness or suicide in case of lack or interruption of treatment. Her request for asylum was rejected at all instances, on the grounds that she would be safe in the Western part of Turkey and that the necessary medical treatment was available in Turkey.

The applicant complained that her expulsion to Turkey would be in violation of **Article 3 ECHR**. She further complained under **Article 13 ECHR** that the German authorities had not duly examined the alleged dangers a deportation would pose to her health and life.

The Court found that the applicant had not substantiated her application regarding the risk of ill-treatment by the authorities or by her family members upon return to Turkey. Concerning the medical condition of the applicant, the Court held that the fact that her circumstances in Turkey may be less favourable than those she enjoyed in Germany cannot be regarded as decisive from the point of view of Article 3. The Court further noted that there was no indication that the domestic authorities will deport the applicant as long as this would pose an imminent danger to her health or life. Therefore the Court found **no violation of Article 3 ECHR**. As the complaint under Article 3 ECHR was manifestly ill-founded and therefore not arguable, the Court found **Article 13 ECHR inapplicable**. The complaint was declared **inadmissible.**

♦ ***Hukic v. Sweden*, Decision of 27 September 2005, Appl. No.17416/05**

- *Article 3 (prohibition of torture)*

The applicants are a married couple and two children from **Bosnia and Herzegovina**. In 2003 they applied for **asylum** in Sweden, submitting that the youngest son was suffering from Down's syndrome and an epileptic illness and would receive no treatment or medical care in his own country. They further submitted that the husband, who was a police officer, helped to arrest a criminal leader and was threatened by the mafia since then. The applicants lodged four repeated requests for asylum or residence permits on humanitarian grounds. All requests were rejected.
The applicants complained that, if deported to Bosnia and Herzegovina, they would risk to be subjected to a treatment in violation of **Article 3 ECHR**.

Concerning the past threats and harassment, the Court found that the applicants had not substantiated that the authorities of Bosnia and Herzegovina were unwilling or unable to protect them. The Court attached importance to the fact that the case concerns the deportation to another High Contracting Party to the ECHR. which has undertaken to secure the fundamental rights guaranteed under its provisions. Therefore the Court found this part of the complaint manifestly unfounded.
While recognizing the seriousness of the handicap of the son and the fact that the care and treatment in Bosnia and Herzegovina most probably would come at considerable cost for the individual, the Court found that the youngest son's state of health cannot be compared to the final stage of a fatal illness and that the present case does not disclose the exceptional circumstances

established by its case-law[9] (see, among other, *D v. United Kingdom*, cited above, § 54 Therefore the application was rejected as being manifestly ill-founded. The complaint is declared **inadmissible**.

C. Cases adjourned

No cases relevant to the international protection of refugees.

D. Cases struck off the list

No cases relevant to the international protection of refugees.

E. Friendly settlements

No cases relevant to the international protection of refugees.

F. Applications communicated to governments

♦ N. v. United Kingdom, Appl. No. 26565/05

- *Protection against refoulement of a HIV patient unable to have access to adequate treatment in the country of origin*
- *Article 3 (prohibition of torture)*

The applicant, a **Ugandan** national, entered the United Kingdom in 1998. She was seriously ill, and admitted to hospital. Some months later she was diagnosed as suffering two AIDS illnesses, and being extremely advanced from an HIV point of view. A medical report stated that "without active treatment her prognosis was appalling, and that her life expectancy would be less than twelve months if forced to return to Uganda, where there was no prospect of her getting adequate therapy". Her asylum application was refused on grounds of credibility and because treatment for AIDS was available in Uganda at highly subsidised prices. An adjudicator dismissed the applicant's appeal against the asylum refusal, but allowed the appeal on Article 3 grounds, finding that her case could warrant an exceptional leave to remain in the United Kingdom. The Secretary of State appealed, and in subsequent court decisions it was concluded that the applicant's removal would not be contrary to Article 3. The House of Lords, relying on the jurisprudence of the European Court of Human Rights, found that the test of exceptional circumstances required under Article 3 was not met, as the applicant's medical condition had not reached such a critical state that there were compelling humanitarian grounds for non-removal. Under Rule 39, the Court indicated interim measure to the UK government, which suspended the expulsion procedure. The application was **communicated to the UK authorities** under **Article 3 ECHR**.

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[9] See *D v. United Kingdom*, Judgment of 2 May 1997, 30240/96, *Manual on Refugee Protection and the ECHR* Part 2.1 – Fact Sheet on Article 3, , p. 4.

G. Rule 39 of the Rules of the Court – Interim measures

♦ ***Ramzy v. the Netherlands*, 15 July 2005, Appl. No. 25424/05**

- *Absolute nature of the prohibition of refoulement under Article 3 ECHR and the fight against terrorism*
- *Article 3 ECHR (prohibition of torture)*

The case concerns the removal to Algeria of a person suspected of involvement in an Islamic extremist group in the Netherlands.

The applicant complains under **Article 3 ECHR** that, if removed to Algeria, he will be exposed to a real risk of torture or ill-treatment by the Algerian authorities.

On 15 July 2005' the Court indicated to the Netherlands Government, under Rule 39 of the Rules of Court, that the applicant should not be removed to Algeria before the Court has decided upon the case.

Leave to intervene as a third party in the Court's proceedings has been granted to:

- The Governments of Italy, Lithuania, Portugal, Slovakia and the United Kingdom;
- The non-governmental organisations the AIRE Centre, Interights (also on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, The International Commission of Jurists, Open Society Justice Initiative and Redress), Justice and Liberty.

The objective of the UK, supported by the above governments, is to challenge the absolute character of the prohibition on return to torture under Article 3 ECHR as established by the Court in the case *Chahal v UK* of 15 November 1996[10]. In UK's view, the State should be able to weight its interest in safeguarding national security against the individual's interest. Given the *Chahal* jurisprudence, which states that regardless of his/her behaviour, the applicant shall not be returned to torture, such a balancing test is currently excluded.

The applicant claims to be Mohammed Ramzy, an Algerian national who was born in 1982. He resides in the Netherlands, where he is known to the authorities under that name and ten other names. He was arrested in the Netherlands on 12 June 2002 on suspicion of involvement in an Islamic extremist network active in the Netherlands, linked to the Algerian Salafist Group for Preaching and Combat. The suspicions concerning the applicant were based on official reports drawn up on 22 and 24 April 2002 by the Netherlands intelligence and security authorities.

On 5 June 2003, following trial proceedings, the court acquitted the applicant of all charges and ordered his release from pre-trial detention. It held that the reports relied on by the prosecution could not be used in evidence. As the intelligence officials had refused to give evidence about the origins of the information set out in the intelligence reports, relying on their statutory obligation to observe secrecy, and as the competent Ministers had not released them from that obligation, the defence had not been given the opportunity to verify in an effective manner the origins and accuracy of the information in the reports. The prosecution initially filed an appeal against that

[10] See *Chahal v. UK*, Judgment of 15 November, 22414/93, *Manual on Refugee Protection and the ECHR* Part 4.1 – Selected Case Law on Article 3, pp. 4-5.

judgment, but withdrew it on 6 September 2005, before the trial proceedings on appeal had started.

Immediately after his release on 5 June 2003, the applicant was apprehended by the aliens' police and placed in aliens' detention for expulsion purposes. On the same day, he applied for **asylum**, claiming that he risked being subjected to torture and/or ill-treatment in Algeria. His asylum request was eventually rejected in a final decision taken by the Council of State on 6 July 2005.
On 14 September 2004, the Minister for Immigration and Integration had issued an exclusion order against the applicant. The Minister held that the applicant was posing a threat to national security. On 31 August 2005, the Minister rejected the applicant's objection to the decision. The applicant's appeal against the decision of 31 August 2005 is currently pending before the Regional Court of The Hague.

On 15 September 2005, he was released from aliens' detention. The Regional Court of The Hague found the applicant's continued placement in aliens' detention to be unlawful, in that there were no prospects for his removal from the Netherlands within a reasonable time.

♦ ***Gebremedhin v. France*, 15 July 2005, Appl. No. 25389/05**

- *Asylum procedure at the border and the concept of manifestly unfounded claims*
-` *Article 2 (Right to life)*
- *Article 3 (Prohibition of torture)*
- *Article 5 (Right to liberty and security)*
- *Article 13 (Right to an effective remedy)*

The Court communicated the application of Mr. Gebremedhin (Application No. 25389/05) to the French government on **30 August 2005**.

Pursuant to Rule 39 of its Rules of Procedure, the Court decided on the same date, to prolong, until further notice, the interim measures, whereby it asked the French authorities to suspend the decision of expulsion taken against the applicant.

Beyond its particular circumstances, the case raises general issues of concern regarding **the procedure of asylum application at the border** and the **non-admission on the territory** in France.

To note, the French association, **ANAFE**, has been **granted leave to intervene as a third party** in the case.

The applicant is an **Eritrean national** born in 1979 currently accommodated by an NGO in Paris. Like a large number of other persons, the applicant and his family were displaced from Ethiopia to Eritrea in 1998.

He worked as a photograph-reporter for the independent newspaper *Keste Debena* headed by Milkias Mihretab. The applicant and Mr. Mihretab were arrested in 2000 on the account of their journalist activity and detained for 8 and 6 months respectively. On the basis of compromising photos found in his flat, the police arrested the applicant once again and kept him for 6 months. During this period he reports to have been ill-treated and to keep traces such as cigarette burns

and back ache. Then, he was transferred to a hospital for medical reasons, from which he escaped. He stayed at his grandmother's where he was cured by a doctor and fled to Sudan to his uncle's. He left Sudan arrived in Paris-Charles de Gaulle airport on 29 June 2005 without ID and was placed in the "zone d'attente" in Roissy.

He was interviewed by a staff member of the OFPRA (no date given), who gave a positive opinion about his admission on the territory. However, another staff member of the OFPRA who interviewed the applicant a second time – assisted by an interpreter – found the application manifestly unfounded, due to contradictory and incorrect statements. For this reason, on 6 July 2005 the Ministry of Interior rejected the application to access to the French territory and decided to expel the applicant to Eritrea or to any country where he would be legally admitted.

On 7 July 2005, the applicant challenged this decision before the Admistrative Court of Cergy Pontoise under an emergency procedure ("en référé") arguing that it seriously undermined his right to seek asylum and his right not to be submitted to inhumane or degrading treatment protected under **Article 3 ECHR**.

On 8 July, the Administrative Court declared the complaint of the applicant manifestly unfounded without any hearing and debate.

The applicant indicated that he was taken by the police to the Eritrean Embassy on 8 July. He reported that the authorities handed over to the Eritrean ambassador his asylum application including details about the circumstances of his flight and the names of the persons, who helped him.

On the 20 July, the MOI allowed the applicant to enter the French territory considering, *inter alia*, the request of the European Court of Human Rights (of 15 July 2005) to suspend the expulsion until 30 August 2005 on the basis of the Rule 39 of its Rules of procedure. On the same basis, a 8 days "sauf-conduit" was issued to the applicant to allow him to lodge an application of a residence permit and asylum claim. With the assistance of ANAFE and reporters sans frontiers, he was granted a one month sojourn authorization. He submitted an asylum application and was granted refugee status by the OFPRA.

The applicant complained that, as a reporter representing the free press, he would face a real risk for his life (**Article 2 ECHR**) or to be submitted to torture or inhumane or degrading treatment (**Article 3 ECHR**) if returned to Eritrea. He held that in the absence of effective judiciary control, the authorities make an abusive use of the notion of manifestly unfounded asylum claim, which is the only basis for refusing the admission on the territory.

The applicant complained under **Article 13 ECHR** (right to an effective remedy) about the lack of suspensive remedy against the decisions of non-admission on the territory.

The applicant argued under **Article 5 ECHR** that he has been illegally deprived of his liberty (for 22 days instead of 20 provided by the law) and without an effective judicial review.

♦ **Other Rule 39 Requests granted during the second semester 2005**:

Application Number	Title	Date of interim measure	Country of destination (if applicable)
24171/05	KARIM c. Sweden	6 Jul 2005	Bangladesh
23944/05	E. COLLINS and A. AKAZIEBIE v. Sweden	8 Jul 2005	Nigeria
26565/05	N. v. the United Kingdom	22 Jul 2005	Uganda
39726/04	MOLASHVILI v. Georgia	26 Jul 2005	-
26844/04	SALEM v. Portugal	28 Jul 2005	India
26834/05	AGBOTAIN et OSAKPOLOR OMOREGBEE v. Sweden	29 Jul 2005	Nigeria
27174/05	T.A. and others v. Sweden	19 Aug 2005	Bangladesh
30977/05	OSMANOVA v. Sweden	26 Aug 2005	Azerbaijan
26853/04	POPOV v. Russia	1 Sep 2005	-
27495/05	MICHALOPOULOS v. Greece	1 Sep 2005	-
31956/05	HAMIDOVIC v. Italy	2 Sep 2005	BIH
32572/05	SALAMZADE KAMAL v. Sweden	9 Sep 2005	Azerbaijan
34559/05	ANGOSOM v. France	4 Oct 2005	Eritrea
36326/05	A.M. v. Finland	11 Oct 2005	Iran
14600/05	ESKINAZI ET CHELOUCHE v. Turkey	12 Oct 2005	Israel
37913/05	HAKIZIMANA v. Sweden	24 Oct 2005	Rwanda
39806/05	PALADI v. Moldova	10 Nov 2005	-
40902/05	BILASI-ASHRI v. Austria	17 Nov 2005	Egypt
61292/00	USEINOV v. the Netherlands	25 Nov 2005	FYRO Macedonia
42175/05	MAHDAWI v. Turkey	28 Nov 2005	Iran
42963/05	MARCHENKO v. Ukraine	5 Dec 2005	-
44092/05	SAFAHANI LANGEROUDI AND ZENDEH DEL v. the Netherlands	13 Dec 2005	Iran
45223/05	SULTANI v. France	20 Dec 2005	Afghanistan

3. <u>Supervision of execution of Judgments by the Committee of Ministers</u>

With regard to the judgment of the Court on 8 July 2004 in the case of *Ilasçu and others v. the Russia Federation and Moldova*[11] the Committee of Ministers adopted on 22 April 2005 Interim Resolution ResDH (2005)42[12] On 13 July 2005, the Committee of Ministers of the Council of Europe adopted a second interim resolution ResDH (2005) 84.

[11] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 5.*8 – Summaries of Judgments and Admissibility Decisions July-December 2004*, p. 1.
[12] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 5.*9 – Summaries of Judgments and Admissibility Decisions January – June 2005*, p. 36.

In the interim resolution, the Committee noted with interest that, since then, the Moldovan authorities have regularly provided information regarding the steps they have taken to secure the release of the applicants who are still imprisoned. The Committee deplored, however, that, since the adoption of this Resolution, the Russian authorities have again called into question the validity of the judgment and have insisted that, by paying the just satisfaction awarded, they consider that they have fully executed the judgment; it further deplored that they have provided no new information regarding any efforts they may have initiated to secure the release of the applicants who are still imprisoned. Having in particular stressed that it is evident that the prolongation of the applicants' unlawful and arbitrary detention for more than one year after the judgment was delivered fails entirely to satisfy the requirements of the Court's judgment, the Committee encouraged the Moldovan authorities to continue their efforts towards putting an end to the arbitrary detention of the applicants still imprisoned and securing their immediate release, and insisted that the Russian authorities take all the necessary steps to do so.

4. Other news

Erik **Fribergh** has been elected Registrar of the European Court of Human Rights in Strasbourg on 7 November 2005.

On **12 December 2005** the European Court of Human Rights elected Peer **Lorenzen** (Danish) as President of the Court's Fifth Section for a three-year term beginning on 1 March 2006.

PART 5 – BIANNUAL UPDATES ON RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 5.11 – Summaries of Judgments and Admissibility Decisions (January – June 2006)

1. Court Judgments

♦ ***Aoulmi v. France*, Final Judgment of 17 January 2006, Appl. No. 50278/99**[1]

- *Proportionality of an expulsion in the interest of the state to protect public order in relation to the applicant's right to family life; reiteration of the binding nature of interim measures under Rule 39 of the Rules of Court*
- *No violation of Article 3 (prohibition of torture)*
- *No violation of Article 8 (right to respect for private and family life)*
- *Violation of Article 34 (individual applications)*

Facts:
The applicant is an **Algerian national** who resided in France for 39 years. He was married to a French national from April 1989 until January 1993 and has a daughter born in 1983. He has been carrying the Hepatitis C virus since 1994. Following repeated convictions, a prison sentence for drug offences resulted in a permanent ban from French territory. The day the prefect issued the order for his deportation to Algeria, the applicant applied to the Court, which immediately requested the French Government to suspend the expulsion under a **Rule 39 interim measure.** Despite this request, the applicant was deported to Algeria on 19 August 1999[2].

Complaints before the Court:
The applicant alleged that his deportation to Algeria would put him at risk of treatment contrary to **Article 3** on account of his state of health as well as his background as a member of a *harki* family (Algerians loyal to the French during the Algerian War of Independence). He also contended, under **Article 8**, that his removal to Algeria would infringe upon his right to respect for family life as he had no ties with that country and his entire family lived in France.

Legal Argumentation:
Article 3
While the Court recognized the applicant's serious illness, it recalled that the threshold set by Article 3 is high, in particularly if no direct responsibility of the Contracting State for the potential infliction of harm is involved, in this case for the substandard health services in Algeria. In addition, the applicant did not satisfactorily prove that he could not receive adequate medical treatment in Algeria. Consequently, the Court did not find that there was a sufficiently real risk to the effect that his deportation would be incompatible with Article 3.

[1] See *UNHCR Manual on Refugee Protection and the ECHR – Update January-June 2005*, p. 17.
[2] At the time, the Court still held that the Rule 39 interim measures were not legally binding.

Concerning risks faced in Algeria on political grounds, the Court reiterated that the mere possibility of ill-treatment on account of the unsettled situation in a particular country was not in itself sufficient to give rise to a breach of Article 3.

The Court therefore found **no violation of Article 3.**

Article 8
The Court held that the expulsion order against the applicant constituted an interference with the applicant's right to respect for his family life but was in accordance with French law and pursued legitimate aims, namely public safety and the prevention of disorder or crime. Thus, it remained to be determined whether the interference was proportionate.

Having taken note of the gravity of the offence and the multiple prior convictions, the Court also observed that the marriage of the applicant was dissolved at the time when the expulsion order was issued and that the applicant had not specified the nature of the "special ties" with his daughter. Accordingly, the Court ruled that there had been **no violation of Article 8**.

Article 34
The Court reiterated its position delivered in *Mamatkulov and Askarov v. Turkey*[3] concerning the binding nature of Rule 39. A failure by a respondent State to comply with interim measures would undermine the effectiveness of the right of individual application enshrined in Article 34.

In the present case, the applicant's expulsion to Algeria prevented the Court from conducting a proper examination of his complaints and from protecting him against potential violations of the Convention.

The Court further stressed that, while the binding nature of measures adopted under Rule 39 had not been expressly asserted at the time of the applicant's expulsion, Contracting States were nevertheless already required to comply with Article 34. The Court, therefore, unanimously found a **violation of Article 34**.

♦ ***Aristimuno Mendizabal v. France*, Final Judgment of 17 January 2006, Appl. No. 51431/99**

- *Non-issuance of a residence permit for a long period*
- *Violation of Article 8 (right to respect for private and family life)*
- *No violation of Article 13 (right to an effective remedy)*

Facts
The applicant is a **Spanish national** living in France since 1975, who was granted political asylum in 1976. Having lost the asylum status in 1979, she was thereafter issued with a series of one-year temporary residence permits. Upon applying for a residence permit in 1989, she was only provided with a receipt entailing a staying permit, which was renewed, with varying durations, some 60 times over the years. In December 2003, the Administrative Court finally granted her a 10-year resident permit under a new French law relating to European Community nationals wishing to settle in France.

[3] See *UNHCR Manual on Refugee Protection and the ECHR – Update January-June 2005*, p. 2.

<u>*Complaints before the Court:*</u>
The applicant complained under **Article 8**, that, for 14 years (since 1989), she did not receive the residence permit she was entitled to, and under **Article 13** about the lack of an effective remedy in relation to the alleged violation.

<u>*Legal Argumentation:*</u>

Article 8
The Court held that the fact that the applicant had not been issued a resident permit since 1989, although she was a regular resident for more than 14 years, constituted an interference with the applicant's right to respect for her family life.

As to whether this interference was in accordance with French law, the Court noted that, from 1989 onwards, the applicant met all legal requirements under the aliens' common law to get a 10-year residence permit. The Court further observed that, from 1992, the applicant was also eligible for a five-year resident permit under European Community provisions.

As the interference lacked a legal basis, the Court found a **violation of Article 8**.

Article 13
The Court held that the French legislation had offered her a set of effective remedies and that there had been **no violation of Article 13**.

Under **Article 41** (just satisfaction), the Court awarded the applicant € 50,000 for all damages.

♦ <u>***Sezen v. the Netherlands*, Final Judgment of 31 January, Appl. No. 50252/99**</u>

- *Territorial ban of an alien resident for his criminal record*
- *Violation of Article 8 (right to respect for private and family life)*

<u>*Facts:*</u>
The applicants are a married couple of **Turkish nationality** residing in Amsterdam. By marrying the second applicant, who held a permanent residence permit, the first applicant also acquired the right to remain in the Netherlands indefinitely. However, following his conviction for the possession of large quantities of heroin and the temporary cessation of cohabitation with his wife, the first applicant was banned from the territory for ten years by the Dutch authorities.

In appeal, the Dutch Court upheld the decision taken in the first instance insofar as it denied the applicant continued residence, but quashed the ban, effectively enabling the applicant to occasionally make visits to the Netherlands for the purpose of visiting his wife and two sons.

<u>*Complaint before the Court:*</u>
The applicants complained about the refusal to allow the first applicant to live indefinitely in the Netherlands, on the basis of **Article 8**.

<u>*Legal Argumentation:*</u>
The Court held that the refusal to prolong the first applicant's residence permit constituted an interference with the applicant's right to respect for his family life. This decision was, however, taken in accordance with Dutch law and pursued legitimate aims, namely public safety and the

prevention of disorder or crime. What was left for the Court was to determine whether the interference was proportionate.

The Court considered both the nature and seriousness of the offence committed by the first applicant and noted that the applicant had strong ties to Turkey, as he had arrived in the Netherlands in 1989, aged 23. Conversely, he had ties to the Netherlands on account of his marriage and the two children from this marriage.

The Court noted that the authorities considered that the couple's marriage had permanently broken down, despite being informed that the applicants were living together again.

The Court recalled that domestic measures with an effect of splitting up a family constituted an interference of a very serious nature. Having found that the applicant's wife and children could not be expected to follow the first applicant to Turkey, the Court noted that the family could not be united as long as the first applicant continued to be denied the right to reside in the Netherlands.

The Court concluded that the Netherlands authorities had failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime. The Court judged that there had been a violation of **Article 8.**

♦ ***Murat Demir v. Turkey*, Final Judgment of 2 March 2006, Appl. No. 42579/98**

- *Compensation of a refugee for human rights violations suffered from persecution*
- *Violation of Article 3 (prohibition of torture)*
- *Violation of Article 6 § 1 (right to a fair trial)*
- *Violation of Article 13 (right to an effective remedy)*

Facts:
The applicant is a **Turkish national** living in Germany. While practicing law in Istanbul, he was arrested on two occasions under anti-terror legislation for allegedly belonging to an illegal military group and taken into police custody where he was allegedly subjected to ill-treatment. The Turkish court, without ruling on the allegations that the applicant's deposition had been taken under duress while in police custody, found him guilty of belonging to an illegal military group and sentenced him to 12 years and six months' imprisonment. The applicant fled to Germany where he obtained political asylum.

Complaints before the Court
The applicant complained under **Article 3** about the ill-treatment he was subjected to in police custody, as well as under **Article 13** about the lack of an effective remedy to air his grievances. He also complained under **Article 6** about procedural unfairness and the length of the proceedings.

Legal argumentation:

Article 3
With regard to the allegations of ill-treatment in police custody in June 1991, the Court took note of a medical examination of the applicant after he was detained for 15 days without access to a

lawyer. The lesions found on his body by the forensic doctor corroborated statements of witnesses regarding his ill-treatment. In the absence of a plausible explanation from the Turkish Government, the Court found that it had been established that the marks on the applicant's body had been caused by treatment **contrary to Article 3.**

Article 13
The Court further noted that, in disregard of the applicant's complaints and the testimonies concerning the ill-treatment, the authorities had not launched an inquiry. The Court consequently held that there had been **a violation of Article 13**, taken together with Article 3.

Article 6 § 1
The Court noted that the applicant had to appear before a court whose panel included a member of the armed forces. The applicant could therefore legitimately fear that the panel might be improperly influenced. Accordingly, the Court held that there had been **a violation of Article 6 § 1 owing to the lack of independence or impartiality** of the State Security Court. The Court further stated that the proceedings, which had cumulatively taken approximately five and half years, had been marred by an unwarranted period of inactivity. The Court therefore judged that there had been **a violation of Article 6 § 1 due to the length of the proceedings**.

Under **Article 41** (just satisfaction), the Court awarded the applicant € 17,500 for non-pecuniary damages.

- ***Shevanovia v. Latvia*, Judgment of 15 June 2006, Appl. No. 58822/00**[4]
- ***Kaftailova v. Latvia*, Judgment of 22 June 2006, Appl. No. 59643/00**

  - *Deportation following loss of nationality in the context of the break-up of the Soviet Union*
  - *Loss of the victim status within the meaning of Article 34*
  - *Violation of Article 8 (right to respect for private and family life)*

Facts:

In the first case, the applicant is a **former citizen of the Soviet Union** of **Russian origin**, who had settled in Latvia for 39 years, marrying a Latvian national with whom she had a son. The break-up of the Soviet Union in 1991 left her **without a nationality.** In 1998, she requested to be registered as a 'non-citizen with a permanent residence'. Upon discovery of another registered residence of the applicant in Russia that she had not declared and uncertainties surrounding her former Soviet passport, the Latvian authorities struck her from the list of residents and issued her a deportation and five-year exclusion order. In February 2001, the applicant was arrested and placed in a detention centre for illegal immigrants pending deportation. Her hospitalization shortly after with high blood pressure caused the authorities to suspend the deportation on account of her health and to order her release. The applicant remained in Latvia without a regularised residence status.

In the second case, it was an applicant of **Georgian origin** who, in 1991, found herself **without a nationality**, seven years after she had settled in Latvia with her husband, a Soviet civil servant,

[4] See *UNHCR Manual on Refugee Protection and the ECHR – Update January-June 2002*, p. 6.

and their daughter. The Latvian authorities registered her as a permanent resident in Latvia in 1993, but cancelled the registration shortly after on the grounds that the stamp in her passport was forged. This allegation was not upheld by the public prosecutor in a 17 January 1994 decision against pursuing a criminal prosecution. Nevertheless, the Latvian authorities struck the applicant off the list of residents on 15 February 1994 and notified her and her daughter on 9 January 1995 of the deportation order.

After a positive admissibility decision by the Court in both cases, the Latvian authorities offered to regularise the status of the applicants by issuing permanent residence permits and invited them to submit the necessary documents. At the time of the Court's judgments, the applicants had not availed themselves of that opportunity.

Complaint before the Court:
The applicants claimed that the deportation order violated their right to respect for their private and family life, guaranteed by **Article 8.**

Legal Argumentation:

Victim Status
The Government argued that the offer to regularise the applicants' status deprived them of their status as a 'victim'.

The Court recalled that a favourable decision by the respondent State was, in principle, not sufficient to deprive an applicant of his/her status as a 'victim' unless the national authorities acknowledged, explicitly or in substance, the breach of the Convention, and afforded adequate redress.

In both cases, the Court did not consider the measures taken by the authorities adequate to mitigate the 7 respectively 11 year long periods of precariousness and legal uncertainty the applicants had gone through, and, therefore, **dismissed the preliminary objection** raised by the Latvian Government.

Article 8
The Court held that the deportation orders in both cases, given the personal, social and economic relationships formed by the applicants during their 35 and 22 respective years in Latvia represented a far-reaching interference in their "private life" within the meaning of Article 8. Although lawful and designed "to prevent disorder", they were in no proportion to the offences allegedly committed by the applicants and **violated Article 8**.

♦ ***D. and others v. Turkey*, Judgment of 22 June 2006, Appl. No. 24245/03**

- *Deportation with the risk of inhuman punishment (flagellation under Sharia law)*
- *Violation of Article 3 (prohibition of inhuman treatment)*

Facts:
The applicants are three **Iranian nationals**, A.D., a Sunni Muslim of Kurdish origin, his wife, P.S., a Shia of Azeri origin and their daughter. All three are currently living in Turkey, where they have been granted a temporary residence permit.

A.D. and P.S. had married in 1996 in a Sunni ceremony in spite of objections by P.S.'s father and therefore in breach of Shia *Sharia* law. After an Islamic court had declared the marriage null and void they remarried in a Shia wedding, this time with the consent of the father. Nevertheless, they were subsequently informed that they had each been sentenced to 100 lashes for fornication under Article 88 of the Criminal Code, the sentence falling into the category known as *haad*, meaning that it is irrevocable.

A.D. was subjected to this punishment on 12 April 1997. As his wife was pregnant, the execution of her sentence was postponed, first until the birth of her daughter and thereafter, on account of her fragile physical and mental health, until 11 October 1999. On that date it was nonetheless decided that there would be no further stays of execution and that the sentence of 100 lashes would be carried out in two sessions of 50 lashes each.

The applicants fled from Iran, entering Turkey on 22 November 1999. Their asylum claim was rejected by the UNHCR Representation to Turkey. As a result, the Turkish immigration service refused, in November 2002, to extend their temporary residence permits. On 22 April 2003, the applicants were requested to either return to Iran or make their way to a third country of their choice, failing which they ran the risk of deportation. A.D. has appealed. To date, no final deportation order has been issued against the applicants, who continue to live in Turkey by virtue of residence permits which have in the meantime been renewed, pending the outcome of the appeal proceedings.

Complaints before the Court:

The applicants submitted that their deportation to Iran would breach **Articles 3, 13 and 14**.

Legal Argumentation:

Article 3

Noting the conditions under which sentences of flagellation were executed in Iran, the Court considered that the mere fact of permitting a human being to commit such physical violence against a fellow human being and moreover in public, was sufficient for it to classify the sentence imposed on the second applicant as "inhuman".

The Turkish Government argued that the punishment of P.S. would have been attenuated on health grounds to such an extent that it could be considered a symbolic penalty, inflicted by means of a special lash with the number of tails equal to the number of blows to be inflicted. Even supposing that was the case, the Court observed that enforcement of the sentence through a single blow from a lash with one hundred tails did not make the punishment "symbolic" or alter its "inhuman" character. Even if physically less harmful, the punishment would still involve treating P.S. in public as an object at the hands of the State, inflicting harm to her personal dignity as well as her physical and mental integrity, as **protected by Article 3**.

The Court unanimously considered that a deportation of P.S. to Iran would constitute a breach of **Article 3** in respect of P.S. and, as already stated in an earlier case[5], also in respect of the other applicants, A.D. and their daughter.

Articles 13 and 14
The Court held that its finding under Article 3 made it **unnecessary** to examine the case under **Articles 13 and 14,** as there was no separate issue.

2. Court Decisions

A. Cases declared admissible

♦ ***Akimova v. Azerbaijan*, Decision of 12 January 2006, Appl. No. 19853/03**

- *Deprivation of use of tenancy rights to meet housing needs of IDPs*
- *Article 6 § 1 (right to a fair trial)*
- *Article 8 (right to respect for private and family life)*
- *Article 1 of Protocol No. 1 (protection of property)*

The applicant, **an Azerbaijani national** living in Baku with her relatives, holds tenancy rights to an apartment that she had not moved into as its construction was not finished. She gave the apartment to R. for temporary use who, in turn, allowed his relative H. and his family, **internally displaced persons** from Agdam, a region of Azerbaijan under Armenian military occupation, to move into and live in the apartment.

When the applicant learnt about the occupancy of her apartment by people unknown to her, she filed a lawsuit requesting the eviction of H. and his family from the apartment. The judicial authorities held that the applicant, as the lawful tenant, had a right to demand H. to vacate the apartment, but that, considering that H. and his family could not return to their permanent place of residence in Agdam and had no other place to live, the eviction had to be suspended pending the liberation of Agdam.

The applicant complained under **Article 6 § 1** that her right to a fair trial had been violated because she had not received a reasoned decision from the domestic courts. She also submitted that she had been unable to live together with her family in her home, in breach of **Article 8** of the Convention. She further argued that her being deprived of her property in the interests of refugees or IDPs lacked a legal basis in Azerbaijan and was disproportionate, and, therefore in violation of **Article 1 of Protocol No. 1 to the ECHR**.

Noting that the Government and the applicant disagreed on the existence of a legal basis for the suspension of the eviction decision, the Court considered that the complaint raised serious issues

[5] See *Bader and others v. Sweden* (Judgment of 8 November 2005, § 46-48), where the Court considered that *"the death sentence imposed on the first applicant following an unfair trial would inevitably cause [all] the applicants additional fear and anguish as to their future if they were forced to return to Syria as there exists a real possibility that the sentence will be enforced in that country"*. See also *UNHCR Manual on Refugee Protection and the ECHR – Update July-December 2005*, p. 10.

of fact and law under the Convention, the determination of which required an examination of the merits. The Court, therefore, concluded that this complaint was **admissible** under, both, **Art 6 § 1 and Article 1 of Protocol No. 1 to the ECHR**.

The Court held that the apartment in question could not be considered the applicant's "home", because she had never resided there and appeared to have established a home elsewhere. The Court, therefore, found the complaint under **Article 8 inadmissible**.

♦ ***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Decision of 26 January 2006, Appl. No. 13178/03**

- *Detention and refoulement of a five-year old separated child*
- *Article 3 (prohibition of torture)*
- *Article 5 (right to liberty and security)*
- *Article 8 (right to respect for private and family life)*
- *Article 13 (right to an effective remedy)*

The applicants are **Congolese nationals**, a mother and her child, living in Montreal. Having obtained refugee status in Canada, the first applicant asked her brother, a Dutch national residing in the Netherlands, to fetch her five-year old daughter from the Democratic Republic of the Congo (DRC) and to look after her until she was able to join her in Canada.

Upon her arrival at Brussels airport, the child was detained in a transit centre on the grounds that she did not have the required documents to enter Belgian territory. After two months, while her detention was found to be illegal by a first instance Belgian court, she was deported to the DRC. She was eventually reunited a few weeks later with her mother in Canada following the intervention of the Belgian and Canadian Prime Ministers.

The applicants complain that:
- the detention for more than two months of the second applicant at the age of five in a closed center for adults as well as her *refoulement* to the DRC amount to violations of **Articles 3 and 8**;
- the detention was in breach of **Article 5 § 1 d)** concerning the limited purposes for which a minor can be detained;
- the immediate *refoulement* prior to a release of the second applicant in accordance with the decision of the Belgian Court deprived her from an effective remedy in violation of **Article 5 § 4 combined with Article 13**.

The Belgian government argues that the refusal to grant refugee status and access to the territory to the girl could have been challenged in two separate procedures, which were not completed by the applicants and that, therefore, the domestic remedies had not been exhausted.

The Court held that, as the domestic remedies were not suitable to address the complaints regarding the way the *refoulement* was implemented and to ensure that the girl be reunited with her mother, the applicants could not have been expected to exhaust them.

Therefore, the Court rejected the argument of inadmissibility for non-exhaustion of the domestic remedy put forward by the Belgium government.

The Court considered that the complaint concerning the detention conditions as well as the *refoulemen*t raised important issues of fact and law under the Convention and was therefore **admissible**.

♦ ***Hussun and others v. Italy*, Decision of 11 May 2006, Appl. Nos. 10171/05, 10601/05, 11593/05, 17165/05**

- *Expulsion of irregular migrants pending a Rule 39 interim measure*
- *Article 2 (right to life)*
- *Article 3 (prohibition of torture)*
- *Article 13 (right to an effective remedy)*
- *Article 34 (individual applications)*
- *Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens)*

The 87 applicants belong to a group of about **1200 irregular migrants who arrived in Lampedusa** between 13 and 25 March 2005 from Libya and were detained in different temporary centres. Between 21 March and 6 April, twenty-six applicants received a deportation order. Fourteen were expelled on 5 April 2005, whereas the other twelve were released as the maximum detention period had been exceeded. Two other applicants escaped from the centre to which they had been transferred.

Given the lack of information received regarding the fate of some of the applicants and that some expulsions had already taken place before the Court's decision on Rule 39, the Court was only in a position to apply interim measures concerning 11 applicants.

The applicants complained:
- under **Articles 2 and/or 3** that, if expelled to Libya, they would be at risk of death and/or inhuman and degrading treatment;
- under **Articles 13** and **4 of Protocol No. 4 to the ECHR** about the lack of an effective remedy and the risk of being subjected to collective expulsion;
- that their right to submit individual applications before the Court was hindered in breach of **Article 34**, as the Italian authorities expelled some of the applicants while the Court was requesting more information for the purpose of applying Rule 39 interim measures.

The Court declared the complaints raised by those applicants who escaped or were released inadmissible.

As for the other applicants, the Court considered that, in light of the parties' submissions, the complaint raised serious issues of fact and law under the Convention, the determination of which required an examination of the merits. The Court therefore declared this part of the application **admissible under Articles 2, 3, 13 and 34 as well as Article 4 of Protocol No. 4 to ECHR.**

The President of the Chamber granted to GISTI (Groupe d'information et de soutien des immigrés) leave to intervene as a third party in the case.

♦ ***Ahmed v. Sweden*, Decision of 16 May 2006, Appl. No. 9886/05**

- *Deportation of an HIV patient to his country of origin*
- *Article 3 (prohibition of torture)*

The applicant allegedly originates **from Somalia or Kenya** and had unsuccessfully applied for asylum in Sweden. He was, however, granted a permanent residence permit on humanitarian grounds. When found to be HIV positive, he started receiving treatment in Sweden.

Upon being convicted of attempted murder and of battery and assault, the applicant was sentenced to imprisonment and permanent expulsion from Sweden. The applicant challenged the expulsion order, arguing that he would not be able to receive adequate treatment for HIV in Somalia.

Uncertain about the exact origin of the applicant, the Swedish government delayed his expulsion pending further investigations. *Médecins sans Frontières* provided information to the government about the health care available in Somalia, referring to UNHCR's Position on the Return of Rejected Asylum-Seekers to Somalia (January 2004) that recommended to strictly avoid the involuntary removal of persons with HIV/AIDS to Somalia. After re-examining the case, the Government decided to expel the applicant to Kenya, where it suspected he came from. On 24 March 2005, following the Court's request under **Rule 39** of the Rules of Court, the Government delayed the execution of the expulsion order until further notice.

The applicant complained that his expulsion to either Somalia or Kenya would amount to treatment contrary to **Article 3.**

The Swedish Government argued that it had not received evidence demonstrating that the applicant's illness had reached an advanced or terminal stage and furthermore denied that the applicant had no prospect of medical care or family support in his country of origin.

In light of the parties' submissions, the Court considered that the case raised important issues of fact and law under the Convention and was therefore **admissible**.

♦ ***Goncharuk v. Russia*, Decision of 18 May 2006, Appl. No. 58643/00**

- *Asylum seeker in exile raising a complaint before the Court without formally exhausting domestic legal remedies*
- *Article 2 (right to life)*
- *Article 3 (prohibition of torture)*
- *Article 13 (right to an effective remedy)*
- *Article 34 (individual applications)*

The applicant, a **Russian national,** currently resides in Norway where she sought asylum. Living in Grozny at the time when hostilities between Russian forces and Chechen fighters resumed, she escaped, wounded, as the only survivor of a group of five civilians attacked by the Russian military on 19 January 2000. The applicant did not contact the law-enforcement bodies after the attack. She argues that, after she had reported her story to human right activists during her stay in hospital, her relatives were threatened by unknown people. As a result, she was afraid of

approaching the authorities for fear that her whereabouts may become known to her persecutors and did not complain to them about the attack in Grozny.

The applicant complained:

- under **Articles 2 and 3** about, both, the attack of 19 January 2000 as well as the Russian authorities' failure to carry out an effective and speedy investigation into the attack;
- that the lack of effective remedies against the alleged violations constituted a breach of **Article 13**;
- about threats received concerning her application to the European Court of Human Rights, which would hinder her right to individual application under **Article 34**.

The Court considered that, in light of the parties' submissions, the case raised important issues of fact and law under the Convention and was therefore **admissible**.

B. Cases declared inadmissible

♦ *Bello v. Sweden*, Decision of 17 January 2006, Appl. No. 32213/04

- *Article 3 (prohibition of torture)*

The applicant is **a Nigerian national** who applied for asylum in Sweden. At an initial interview conducted by the Swedish Migration Board, the applicant stated that she had been forced, by her father, to marry a 60 year-old man against her will. Being pregnant by her younger lover, she claimed to have fled to escape the risk of a death sentence foreseen by *Sharia* law for adulterous acts. During a second interview, the applicant made contradictory statements concerning, *inter alia*, the circumstances of her departure.

The Swedish authorities rejected her application for asylum on the grounds that, irrespective of the truthfulness of her story, the applicant had not proved the failure of the Nigerian authorities to protect her.

The applicant complained under **Article 3** that her life would be at risk if returned to Nigeria as the authorities abided to *Sharia* law.

While the Court acknowledged that complete accuracy of dates and events could not be expected from a person seeking asylum, it was concerned by the number of major inconsistencies in the applicant's story.

The Court found that there were strong reasons to question the veracity of the applicant's statements and that she had offered no reliable evidence in support of her claims. The application was rejected as **manifestly ill-founded** and declared **inadmissible.**

♦ ***Gomes v. Sweden*, Decision of 7 February 2006, Appl. No. 34566/04**

- *Article 2 (right to life)*
- *Article 3 (prohibition of torture)*
- *Article 8 (right to respect for private and family life)*
- *Article 1 of Protocol No 13 (protection of property)*

The applicant is a **Bangladeshi national** who applied for asylum in Sweden in November 1999 claiming to be a member of an opposition party and to have been subjected to torture. The Swedish authorities deemed that the applicant had been providing contradicting information and that he had not been able to submit any documentation substantiating his allegations. However with a view to his medical condition, he was granted a permanent resident permit. His wife joined him in Sweden in May 2003, together with their daughter, born in 1997.

In 2003, the applicant was sentenced by Swedish judicial authorities to a one-year imprisonment and subsequent expulsion from Sweden for aggravated assault against his wife. Noting the severity of his acts and the weakness of his links established with Sweden, the national courts held that there were no obstacles to his expulsion.

The applicant complained:
- **under Articles 2 and 3**, that he faced a risk of being subjected to death penalty or life imprisonment as well as torture in Bangladesh;
- and that, if expelled to Bangladesh, he would be separated from his daughter, in violation of **Article 8**.

The Court found that **Article 1 of Protocol No. 13 to the ECHR** was also applicable to the applicants' complaints. As the issues under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 were indivisible, the Court decided to examine them together.

Articles 2 and 3 and Article 1 of Protocol No. 13
The Court took note of the contradictory character of the information given by the applicant and of the lack of documents proving his allegations, and judged this part of the complaint to be **manifestly ill-founded**.

Article 8
The Court examined the proportionality of the expulsion in relation to the applicant's right to family life. The Court noted that the applicant did not appear to have established any stable links in Sweden and that he had only lived with his daughter for five months since November 1999. The Court also took note of the gravity of the criminal acts committed by the applicant, underlining that these acts against his wife showed little consideration for the importance of family life.

Consequently, the Court found that it could not be considered to be disproportionate to expel the applicant to prevent disorder or crime and, therefore, also rejected this part of the complaint as **manifestly ill-founded**.

Accordingly, the Court declared the application **inadmissible.**

♦ ***Z. and T. v. United Kingdom*, Decision of 28 February 2006, Appl. No. 27034/05**

- *Potential protection against refoulement in exceptional circumstances on the basis of Article 9*
- *Article 8 (right to respect for private and family life)*
- *Article 9 (freedom of thought, conscience and religion)*

The applicants are two sisters of **Pakistani origin** and belong to the Christian community. They entered the United Kingdom, where their relatives had been granted asylum. They applied for asylum on account of a fear of persecution by the Muslim community in Pakistan due to their religious beliefs. The authorities rejected the applications, noting that Christians were a recognized minority group in the Pakistani Constitution and that the Government was taking measures to curb acts of sectarian violence.

The applicants complained under **Article 9** that, if returned to Pakistan, they would be subjected to attacks and would not be able to live openly and freely as Christians.

The applicants also invoked **Article 8**, complaining that they were prevented from living in the United Kingdom with their parents, brothers and sister.

The Court did not rule out the possibility that the responsibility of the returning State might, in exceptional circumstances, be engaged under Article 9 where the person concerned ran a real risk of a flagrant violation of that provision in the receiving State. However, the Court considered that it would be difficult to contemplate a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3.

In the present case, the Court observed that the applicants had not shown that they were personally at risk or were members of such a vulnerable or threatened group as might amount to a flagrant violation of **Article 9** of the Convention. This complaint was therefore deemed **manifestly ill-founded**.

In regard to **Article 8**, the Court considered that it could not impose a general obligation on a State to respect immigrants' choice of their country of residence and to authorize family reunion in its territory. Taking into consideration that the applicants were adults, with families of their own, and that they lived separately from their parents, the Court discerned no elements of dependency beyond the normal emotional ties between the applicants and the members of their family now living in the United Kingdom. This part of the complaint was also declared **manifestly ill-founded**.

The application was therefore found **inadmissible.**

♦ ***Jeltsujeva v. the Netherlands*, Decision of 1 June 2006, Appl. No. 39858/04**

- *Article 3 (prohibition of torture)*

The applicant is a **Russian national** from Chechnya, who applied for asylum in the Netherlands. She allegedly fled Chechnya on account of a fear of persecution on religious grounds as a

Christian. In the absence of any identity documents, the Dutch authorities decided to carry out a medical age verification test, which concluded that the applicant was 20 or 21 and not 16 years old as claimed. The Dutch authorities rejected the applicant's asylum request for lack of credibility; this decision was held up the appeal court.

The applicant complained, *inter alia*, that, if expelled to Russia, she would be exposed to a real risk of treatment contrary to **Article 3.**

When examining the circumstances of the case, the Court referred to relevant international materials including the UNHCR document on "The Situation of Asylum-Seekers from the Russian Federation in the context of the situation in Chechnya" of February 2003 as well as "UNHCR's Position Regarding Asylum-Seekers and Refugees from the Chechen Republic, Russian Federation" issued on October 2004.

Regarding **Article 3**, the Court observed that the claim was not substantiated. It also noted that the applicant had an internal flight alternative in the Russian federation and that her personal position was not worse than that of other IDPs from Chechnya. The Court further held that, while these general living conditions were "*far from ideal*", they did not attain the level of severity required to fall within the scope of Article 3. This part of the application was therefore rejected for being **manifestly ill-founded**.

The Court declared the application **inadmissible.**

C. Cases adjourned

No cases relevant to the international protection of refugees.

D. Cases struck off the list

The following expulsion cases against Sweden generally entailed similar circumstances: Upon application of the **Rule 39 interim measures** by the Court, the Swedish authorities immediately revoked their deportation orders and granted the applicants residence permits a few months later.

- ***Elezi and Others v. Sweden*, Decision of 17 January 2006, Appl. No. 4244/05**
- ***Mostachjov and Others v. Sweden*, Decision of 17 January 2006, Appl. No. 4891/04**
- ***Kohinur and Others v. Sweden*, Decision of 31 January 2006, Appl. No. 4144/05**
- ***Rubina and Rubin v. Sweden*, Decision of 31 January 2006, Appl. No. 35733/04**
- ***Müslüm Zade and Others v. Sweden*, Decision of 31 January 2006, Appl. No. 41983/04**
- ***Khalilov and Others v. Sweden*, Decision of 31 January 2006, Appl. No. 5212/05**
- ***Hasanova v. Sweden*, Decision of 31 January 2006, Appl. No. 11665/05**

- ***Shloun v. Sweden*, Decision of 4 April 2006, Appl. No. 17185/04**
- ***Muliira v. Sweden*, Decision of 23 May 2006, Appl. No. 7260/05**
- ***Ragimova and others v. Sweden*, Decision of 23 May 2006, Appl. No. 5607/05**
- ***Abdelrahman Hussein and Others v. Sweden*, Decision of 30 May 2006, Appl. No. 33735/04**

E. Friendly settlements

No cases relevant to the international protection of refugees.

F. Applications communicated to governments

No cases relevant to the international protection of refugees.

G. Rule 39 of the Rules of the Court – Interim Measures

In the first half of 2006, the Court granted 18 requests for Rule 39 interim measures:

Application Number	Title	Date of interim measure
30693/05	RAFAT ET GALOGA v. the Netherlands	19 January 2006
3990/06	KAMYSHEV v. Ukraine	27 January 2006
4900/06	A. v. the Netherlands	2 February 2006
5140/06	MOHAMMADI v. the Netherlands	3 February 2006
6575/06	KORDIAN v. Turkey	16 February 2006
6781/06	ISSE SECK v. the Netherlands	17 February 2006
40207/05	DOLIDZE v. Georgia	1 March 2006
44009/05	SHTUKATUROV v. Russia	9 March 2006
10632/06	MARGARYAN v. Sweden	20 March 2006
14490/06	MASASA v. France	19 April 2006
15825/06	YAKOVENKO v. Ukraine	28 April 2006
15843/06	BARAKA v. France	27 April 2006
17575/06	GRIGORIAN and others v. Sweden	10 May 2006
6293/04	MIRILASHVILI v. Russia	12 May 2006
19677/06	MUSSENERO v. the United Kingdom	22 May 2006
3373/06	MOHAMMADI and others v. Turkey	31 May 2006
23247/06	GUO v. Finland	12 June 2006
22871/06	YOUB SAOUDI v. Spain	12 June 2006

3. Supervision of Execution of Judgments by the Committee of Ministers

♦ ***Ilasçu and others v. the Russia Federation and Moldova*, Final Judgment of 8 July 2004, Appl. No 48787/99**

With regard to the judgment of the Court in the case *Ilasçu and others v. the Russian Federation and Moldova*[6] on 8 July 2004, the Committee of Ministers adopted two Interim Resolutions, ResDH(2006)11 on 1 March 2006 and ResDH(2006)26 on 10 May 2006.

The Committee stressed that the continued excessive prolongation of the applicants' unlawful and arbitrary detention [by the *Transdniestrian* authorities] failed entirely to satisfy the requirements of the Court's judgment and the obligation under **Article 46 § 1**.

The Committee noted that the Moldovan authorities have regularly provided information regarding their steps taken to secure the release of the applicants who are still imprisoned.

The Committee, however, profoundly regretted that the Russian authorities have not actively pursued all effective avenues to comply with the Court's judgment, despite the Committee's successive demands[7] to this effect, and declared its resolve to ensure, with all means available to the Organisation, the compliance by the Russian Federation with its obligations under this judgment.

♦ ***Conka v. Belgium*, Final Judgment of 5 February 2002, Appl. No 51564/99**

With regard to the Court judgment in the case *Conka v. Belgium*[8] on 5 February 2002, the Committee of Ministers adopted, on 5 April 2006, Interim Resolution ResDH(2006)25, welcoming and encouraging the ongoing broad reform of the Conseil d'Etat and of proceedings related to aliens undertaken by the Belgian authorities in compliance with the requirements of the Convention, as highlighted in this judgment.

4. Other news

Election of new judges to the European Court of Human Rights: On 11 April 2006, **Mark Villiger** (Swiss) was elected for Liechtenstein, and on 27 June 2006, **Päivi Hirvelä** for Finland, **Isabelle Berro-Lefevre** for Monaco and **Giorgio Malinverni** for Switzerland.

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[6] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 5.8 – *Update July-December 2004*, p. 1.
[7] See Interim Resolutions ResDH(2005)42 of 22 April 2005 and ResDH(2005)84 of 13 July 2005.
[8] See *UNHCR Manual on Refugee Protection and the ECHR*, Part 5.3 – *Update January-June 2002*, p. 1.