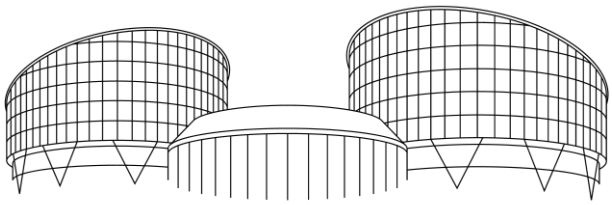

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MEHMET NURİ ÖZEN AND OTHERS v. TURKEY

(Applications nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08 and 58170/08)
(Extracts)

JUDGMENT

This version was rectified on 15 March 2011
under Rule 81 of the Rules of Court

STRASBOURG

11 January 2011

FINAL

11/04/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mehmet Nuri Özen and Others v. Turkey**,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 7 December 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in eleven applications (nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08 and 58170/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by ten Turkish nationals, Mr Mehmet Nuri Özen (no. 15672/08), Mr Abdulkadir Uçar (no. 24462/08), Mr Nezir Adıyaman (no. 27559/08), Mr Canar Yurtsever (no. 28302/08), Mr Erol Yılmaz (no. 28312/08), Mr Zafer Balcı (no. 34823/08), Mr Mehmet Nuri Tanış (nos. 40738/08 and 43197/08), Fevzi Abo (no. 41124/08), Mr Engin Babayiğit (no. 51938/08) and Mr Ergün Karaman (no. 58170/08) ("the applicants"), respectively on 6 August 2008 (no. 40738/08), 14 May 2008 (no. 15672/08), 17 May 2008 (no. 24462/08), 27 May 2008 (nos. 27559/08, 28302/08 and 28312/08), 16 June 2008 (nos. 34823/08 and 41124/08), 19 August 2008 (no. 43197/08), 28 August 2008 (no. 51938/08) and 6 November 2008 (no. 58170/08).

2. The applicants were represented by Mr M. Erbil (nos. 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 41124/08 and 51938/08) and Mr M. Vargün and Mr D. Bayır (nos. 15672/08, 40738/08, 43197/08 and 58170/08), lawyers practising in Istanbul and Ankara respectively. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged that they had suffered a discriminatory breach of their right to respect for their correspondence (Articles 8 and 14). Several of them also complained that the national authorities had lacked independence and impartiality, that the disciplinary proceedings had not been public, and that the national courts had failed to give reasons for their

decisions (Article 6 § 1). Some also alleged that the proceedings had been unfair (Article 6 § 3 (a), (b) and (c)) and that they had not had access to an effective remedy (Article 13). Lastly, certain applicants relied on Articles 9, 10, 17 and 18 of the Convention.

4. On 11 May 2009 the President of the Second Section decided to give notice of the applications to the Government. In accordance with Article 29 § 3 of the Convention, it was decided that the admissibility and the merits of the case would be examined at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are Turkish nationals.

6. They are all serving sentences in Turkish high-security prisons, where the authorities refused to dispatch their letters written in a language other than Turkish. They all brought proceedings before the competent domestic courts to oblige the prison authorities to dispatch their letters, but to no avail.

7. At the time they lodged their applications, the applicants were serving their sentences in the F-type prison in Tekirdağ or the Bolu prison high-security prison.

1. Mehmet Nuri Özen

8. On 14 January 2008 the Disciplinary Board at the applicant's prison proceeded, in accordance with section 68 § 3 of Law no. 5275 on the execution of sentences and preventive measures ("Law no. 5275"), to check a letter the applicant had written to another prisoner in Kurdish. After reminding him that letters should in principle be written in Turkish, they informed him that they could not have the letter translated, for lack of staff, so they were unable to ascertain, as required under Rule 122 § 1 of the Regulations on prison management and the execution of sentences ("the Prison Regulations"), whether the content of the letter was "inoffensive". They therefore decided to return the letter to the applicant.

9. On 28 January 2008, on the basis of the case file, the Bolu enforcements judge dismissed the applicant's appeal against that decision.

10. On 12 February 2008 the Bolu Assize Court, also dismissed an appeal lodged by the applicant against that decision.

2. Abdulkadir Uçar, Nezir Adıyaman, Canar Yurtsever and Erol Yılmaz

11. On 21 and 26 September 2007 the Disciplinary Board decided to keep one letter written by each of the applicants in Kurdish. Arguing that the prison had neither the staff nor the money to have them translated, they explained that the letters could be sent once they had been translated, at the applicants' expense, by a sworn translator and their content had been found to be inoffensive.

12. On 6 November 2007, based on the case file, the Tekirdağ enforcements judge dismissed an appeal lodged by the applicants. That decision was reached after the judge examined the public prosecutor's submissions, according to which "it [was] necessary to have the correspondence – which was written in a language other than the official language – translated in order to have it verified in accordance with section 68 § 3 of Law no. 5275; there [were] no legal provisions requiring the prison to cover the cost of the translation; as the interested parties themselves had not paid for a translation, there [was] nothing unlawful about the impugned decisions".

13. On 19 and 27 November 2007, based on the case file, the Tekirdağ Assize Court dismissed an appeal lodged by the applicant against that decision, having found no legal or procedural defect.

3. Zafer Balcı

14. On 10 October 2007 the Disciplinary Board decided, pursuant to section 68 § 3 of Law no. 5275 and Rule 91 § 3 of the Prison Regulations, to seize a letter the applicant had written to his mother in Kurdish. They explained that they had been unable to decipher the content of the letter because the prison staff did not understand Kurdish.

15. On 22 November 2007, based on the case file, the enforcements judge dismissed an appeal lodged by the applicant. That decision was reached after the judge examined the public prosecutor's submissions, according to which "it [was] necessary to have the correspondence – which was written in a language other than the official language – translated in order to have it verified in accordance with section 68 § 3 of Law no. 5275; the prison [had] no budget for translation costs. As the interested party had not paid for a translation himself, there [was] nothing wrong with the impugned decision".

16. On 18 December 2007, based on the case file, the Assize Court dismissed an appeal lodged by the applicant against that decision, having found no legal or procedural defect.

4. Mehmet Nuri Tanış

17. On 2 May 2008, the Disciplinary Board decided not to send a letter the applicant had written to his mother in Kurdish, because they were unable to have it translated and thus to understand its content and determine whether it was "inoffensive".

18. On 26 May 2008 they reached a similar decision concerning a letter written by the applicant to his sister in Kurdish.

19. On 20 May and 18 June 2008 respectively, on the basis of the case file, the Bolu enforcements judge dismissed the applicant's appeal against those decisions not to send his letters, considering that the Board's decisions were fully in keeping with section 68 § 3 of Law no. 5275 and Rule 123 § 1 of the Prison Regulations, as it had not been possible to determine whether the content of the letters matched any of the criteria set forth in section 68 § 3 of Law no. 5275.

20. On 6 June and 11 July 2008 respectively, basing itself on the case file, the Bolu Assize Court rejected the applicant's complaint against these decisions, noting that the refusal to dispatch the letters had been based not on the fact that they were written in Kurdish but on the fact that their content was incomprehensible and therefore impossible to verify having regard in particular to the imperatives of order and security.

5. Fevzi Abo

21. On 10 October 2007 the Disciplinary Board decided to seize a letter the applicant had written in Kurdish, in conformity with section 68 § 3 of Law no. 5275 and rule 91 § 3 of the Prison Regulations, on the grounds that they had been unable to decipher the content of the letter because the prison staff did not understand Kurdish.

22. On 20 November 2007, based on the case file, the enforcements judge rejected the applicant's appeal. That decision was reached after the judge examined the public prosecutor's submissions, according to which "it [was] necessary to have correspondence which was written in a language other than the official language translated, in order to have it checked in accordance with section 68 § 3 of Law no. 5275. The prison [had] no budget for translation costs. As the interested party had not paid for a translation himself, there [was] nothing wrong with the impugned decision."

23. On 18 December 2007, based on the case file, the Assize Court dismissed an appeal by the applicant against that decision, finding that there had been no procedural defect or error of law.

6. Engin Babayiğit

24. On 21 January 2008, relying on Rules 91, 122 and 123 of the Prison Regulations, the Disciplinary Board decided not to send a letter the applicant had written in Kurdish. They explained that the prison had no staff

to translate the letter and took note of the prisoner's refusal to cover the cost of translation himself.

25. On 6 February 2008, based on the case file, the Kocaeli enforcements judge found that the Board's decision was in conformity with prison Rules 91, 122 and 123.

26. On 28 February 2008, on the basis of the case file, the Kocaeli Assize Court rejected an appeal lodged by the applicant.

7. Ergün Karaman

27. On 2 May 2008, the Disciplinary Board decided to refuse to send a letter the applicant had written to his father in Kurdish, on the grounds that they could not understand its content and determine, as required by Rule 122 § 1, whether it was "inoffensive". After pointing out that correspondence should, in principle be written in Turkish, they explained that they did not have any staff to translate the letter.

28. On 20 May 2008, noting that the letter in question contained characters which were not in the Latin alphabet, the Bolu enforcements judge dismissed the applicant's appeal, pointing out that while the right to correspondence was guaranteed, it was not unlimited, and that in this particular case it was not possible to ascertain whether the content of the letter fell within the scope of the restrictions set forth in section 68 § 3 of Law no. 5275.

29. On 10 June 2008 the Bolu Assize Court observed that the reason behind the decision not to send the letter was not the fact that it was written in Kurdish but the fact that its content was incomprehensible, making it impossible to carry out the verification provided for in section 68 § 3 of Law no. 5275.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. Section 68 of Law no. 5275 of 13 December 2004 on the execution of sentences and preventive measures, published in the Official Gazette on 29 December 2004, reads as follows:

> "1. With the exception of the restrictions set forth in this section, convicted prisoners shall have the right, at their own expense, to send and receive letters, faxes and telegrams.
>
> 2. The letters, faxes and telegrams sent or received by prisoners shall be monitored by the reading committee in those prisons that have such a body, or, in those which do not, by the highest authority in the prison.
>
> 3. If letters, faxes and telegrams to prisoners are a threat to order and security in the prison, single out serving officials as targets, permit communication between terrorist or criminal organisations, contain false or misleading information likely to cause panic in individuals or institutions, or contain threats or insults, they shall not be forwarded to the addressee.

Nor shall [letters, faxes and telegrams of the type described above] written by prisoners be dispatched.

..."

31. Rule 91 of the Prison Regulations of 20 March 2006 on prison management and the execution of sentences, published in the Official Gazette on 6 April 2006, reads as follows:

"1. Convicted prisoners shall have the right, at their own expense, to send and receive letters, faxes and telegrams.

2. The letters, faxes and telegrams sent or received by prisoners shall be monitored by the reading committee in those prisons that have such a body, or, in those which do not, by the highest authority in the prison.

3. If letters, faxes and telegrams to prisoners are a threat to order and security in the prison, single out serving officials as targets, permit communication between terrorist or criminal organisations, contain false or misleading information likely to cause panic in individuals or institutions, or contain threats or insults, they shall not be forwarded to the addressee.

..."

32. Rule 122 § 1 of the Prison Regulations reads as follows:

"In the framework of the right to send and receive correspondence under section 91 above, letters, faxes and telegrams written by prisoners shall be handed, in open envelopes to the staff responsible for surveillance and security, who shall transmit them to the reading committee ... A 'seen' stamp shall be affixed to those letters which, upon examination, appear inoffensive. [Such letters] shall be placed in envelopes and given to the postal services ..."

33. Rule 123 of the Prison Regulations reads as follows:

"1. Those incoming or outgoing letters which are not considered inoffensive by the reading committee shall be transmitted to the Disciplinary Board within 24 hours. If the Disciplinary Board finds a letter to be offensive in full or in part, the letter shall be kept until the time-limit for filing a complaint or an objection has expired, without the original being altered or destroyed. If a letter is found to be offensive in part, the original shall be kept by the prison authorities and a photocopy delivered – with the offending passages struck out in such a way as to be illegible – together with the Board's decision. If the whole letter is found to be offensive, only the decision of the Disciplinary Board is delivered. The Disciplinary Board's decision shall become final upon expiry of the time-limit for applying to the enforcements judge, which shall start to run on the date of delivery. If the matter is sent before the enforcements judge, his decision shall become final upon expiry of the time-limit for appeal, which shall start to run on the date of the decision of the enforcements judge. If an appeal is made to set aside the decision of the enforcements judge, the decision of the court examining the appeal shall apply.

2. The notice given to the prisoner must inform him that if no complaint is lodged with the enforcements judge within fifteen days of the Disciplinary Board's decision being served, or if no appeal against the decision of the enforcements judge is lodged with the Assize Court within one week of its being served, the decision of the Disciplinary Board shall become final, and that the letter concerned will be forwarded

after the offending passages have been deleted and rendered illegible, or that the whole letter is considered offensive and will not be delivered.

3. Those letters considered offensive in full or in part shall be kept by the prison authorities for use if an appeal is lodged at the national or international level."

34. On 13 October 2009 the Prison Service of the Ministry of Justice sent public prosecutors and prison governors as well as enforcements judges, a circular concerning translation costs. Referring to Articles 8 and 10 of the European Convention on Human Rights, the relevant passages read as follows:

"There are certain things we wish to bring to your attention ..., in order to put a stop to any uncertainty concerning the exercise of the right to receive or send publications, letters, faxes or telegrams written in a dialect or language other than Turkish ....

...

Examination of prison budgetary practices reveals that there is no budget provision for the translation into Turkish of periodical or non-periodical publications and correspondence written in a dialect or language other than Turkish. If a prison is unable to provide this service using local resources, it is possible to solve the problem by charging the cost to the "purchase of services" budget head, under the sub-head 'purchase of other services', which includes the item 'expenditure on translations not counted as author's rights'.

In this connection,

1. It is sufficient to provide a "summary report" summarising the general content of documents such as periodical or non-periodical publications, letters, faxes and telegrams written in a language other than Turkish;

2. If there are prison staff with a knowledge of the language or dialect concerned, they should be asked to prepare the summary report;

3. If the problem cannot be resolved in the manner described in the preceding paragraph, it is possible, for a 'reasonable' fee:

(a) to make use of local resources and, at this stage, take advantage of the skills of staff working in other administrative entities;

(b) if that also proves impossible, to have recourse to reliable persons in the area or district who are familiar with the language or dialect concerned."

THE LAW

I. JOINDER OF THE CASES

35. In view of the similarity between the cases in terms of the facts and substantive issues they raise, the Court, by virtue of Rule 42 § 1 of the Rules of Court, decides to join them.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicants all alleged that their right to freedom of correspondence had been violated. In applications nos. 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 41124/08 and 51938/08 the applicants objected to the Turkish authorities' failure to pay for the translation of their correspondence into Turkish. They relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ... the prevention of disorder or crime ... or for the protection of the rights and freedoms of others."

37. The Government disagreed.

...

B. The merits

1. Whether there was interference

38. The Government disputed that there had been any interference with the applicants' right to respect for their correspondence, in so far as the refusal to send their letters had been based not on their content but on the fact that they had not been translated. In the Government's submission, therefore, no issue arose under Article 8.

39. The Court notes that it is not in dispute that the prison authorities refused to forward the applicants' letters to their addressees, and that the courts concerned upheld those decisions (see paragraphs 8-29 above).

40. The Court has already held that the mere monitoring of prisoners' correspondence by the authorities amounts to an "interference" with their right to respect for their correspondence within the meaning of Article 8 (see, for example, *Calogero Diana v. Italy*, 15 November 1996, § 28, *Reports of Judgments and Decisions* 1996-V). This means that the actual content of the correspondence is immaterial in determining whether a restrictive measure constitutes an "interference": what counts is whether the private correspondence was interfered with (see *Frerot v. France*, no. 70204/01, 12 June 2007, § 54).

41. Clearly, therefore, the decisions not to send the letters amounted to an interference.

2. Whether the interference was justified

42. Such an interference will violate Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in

paragraph 2 of Article 8 and is "necessary in a democratic society" to achieve those aims.

a. The Government's submissions

43. The Government pointed out that the Court did not prohibit all interference with prisoners' correspondence. Its case-law acknowledged that some measure of control over prisoners' correspondence was called for to preserve order in prisons and was not, of itself, incompatible with the Convention (*Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, and *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233).

44. The Government argued that, were the Court to find that there had been interference, the interference was justified under the second paragraph of Article 8. In their submission it was in accordance with the law, pursued a legitimate aim, namely preventing disorder and crime, and was necessary in a democratic society. The Government explained that there were legal guarantees to protect people against arbitrary interference by the public authorities. Lastly, they submitted that the State was under no obligation to cover the cost of translating prisoners' correspondence, no such obligation being provided for in the Convention.

b. The applicants' submissions

i. Submissions of Mehmet Nuri Özen, Mehmet Nuri Tanış and Ergün Karaman

45. Relying on the cases of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX) and *Yankov v. Bulgaria* (no. 39084/97, ECHR 2003-XII), the applicants submitted that their conviction did not deprive them of their rights under the Convention. They were therefore entitled to respect for their correspondence. As their visiting hours were restricted, the possibility of exchanging correspondence with the outside world was their main way of keeping in touch with their families. Referring to the *Chishti v. Portugal* case ((dec.), no. 57248/00, 2 October 2003), they alleged that there was no law prohibiting correspondence in a language other than Turkish. In their submission the interference with their rights was therefore arbitrary as there was no legal basis for it.

46. In addition, while the applicants acknowledged that some supervision of correspondence was necessary to guarantee security in prison and prevent crime, they argued that this could not justify prohibiting prisoners from corresponding with their families in a language other than Turkish. In their submission this ban on written communication was in contradiction with the practice of authorising oral communication in another language. There were laws which authorised prisoners to speak Kurdish on the telephone or when they had visitors. This surely indicated that the interference with their correspondence pursued no legitimate aim for the

purposes of Article 8 § 2 of the Convention, as the right to speak Kurdish was already acknowledged in prisons.

47. The applicants also criticised the authorities' refusal to examine the content of the correspondence when they were equipped to do so for other forms of communication. They alleged that the authorities' reluctance to examine the content of their letters was based on the arbitrary assumption that all correspondence written in another language was potentially dangerous. In this particular case there was no pressing social need capable of justifying the attitude of the domestic authorities.

48. They further submitted that the States should make allowance for the linguistic, cultural and religious specificities of prisoners, particularly those who belonged to a minority group. Lastly, they contended that the Government's argument that the State should not have to pay the cost of translation was contradictory considering the practice in respect of oral communications. Expecting detainees to pay the cost of translations placed an excessive burden on them, and a burden which, in their submission, was not imposed on foreign prisoners.

ii. Submissions of Abdulkadir Uçar, Nezir Adıyaman, Canar Yurtsever, Erol Yılmaz, Zafer Balcı, Fevzi Abo and Engin Babayiğit

49. The applicants submitted that their mother tongue was Kurdish and they were more fluent in that language. They further submitted that the Government had failed to explain what criteria they had used, and why a letter written in a language other than Turkish and therefore incomprehensible to the authorities was likely to jeopardise prison security. Nor had they explained what preventive aim the measures pursued.

c. The Court's assessment

50. The Court refers to the basic principles enshrined in its case-law on the matter (see *Silver and Others*, cited above, §§ 85-90; *Calogero Diana*, cited above, §§ 28, 32 and 33; *Petra v. Romania*, 23 September 1998, § 37, *Reports* 1998-VII; and *Cotleţ v. Romania*, no. 38565/97, §§ 59 and 61-65, 3 June 2003). It will examine the case in the light of these principles.

51. It points out, first of all, that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention, regard being had to the ordinary and reasonable requirements of imprisonment (see *Campbell*, cited above, § 45). In that connection it observes that under Turkish law prisoners' correspondence is subject to a checking process before it is forwarded.

52. Any letter sent to or by a prisoner which is considered offensive may thus, by decision of the prison's Disciplinary Board, be partly censored or not be sent at all (see paragraphs 30-33 above). The Court notes, however, that the domestic laws governing such matters give an exhaustive list of the

circumstances in which a letter written by a prisoner may be withheld from the addressee.

53. Only correspondence the content of which is a threat to order and security in the prison, singles out serving officials as targets, permits communication between terrorist or criminal organisations, contains false or misleading information likely to cause panic in individuals or institutions, or contains threats or insults, may be withheld from the addressee (see paragraphs 30 and 31 above).

54. Examination of the domestic court decisions, however, reveals that the decisions not to forward the applicants' letters were based on none of the above criteria. Although they referred to section 68 § 3 of Law no. 5275 and Rule 91 of the Regulations on prison management and the execution of sentences to explain their decisions, it nevertheless remains – and the Government have acknowledged this (see paragraph 39 above) – that the domestic authorities refused to send the letters not because their content failed to satisfy the above-mentioned requirements concerning security and the prevention of crime, but because the authorities concerned were unable to understand the letters.

55. Being unable to understand the language in which the letters were written, the authorities stated that they were unable to determine whether their content was "inoffensive". As the law required them to establish the offensive nature of correspondence before interfering with it (see paragraph 33 above), the question of the legal basis for the interference arises.

56. The Court reiterates that it has already held that while a law which confers a discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, and the likely outcome of any search for certainty would be excessive rigidity (see, among other authorities, *Calogero Diana*, cited above, § 32). The law must be able to keep pace with changing circumstances, and the Court accepts that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Silver and Others*, cited above, § 88).

57. In the instant case, however, it observes that no law or regulation envisages the possibility of prisoners using a language other than Turkish in their written correspondence, or prohibits it or applies any restrictions in the matter. So while under domestic law the attribution to custodial facilities of the power to monitor and censor correspondence hinges only on the content thereof, in this particular case the authorities paid no heed to the content of the letters concerned. Their decisions not to forward the applicants' correspondence were not based on any of the grounds listed in the law or regulations.

58. The Court accordingly concludes that the interference complained of was not "in accordance with the law".

59. The Court also observes that at the material time, in the absence of any legal framework giving instructions for processing correspondence written in a language other than Turkish, the procedure was left entirely to the discretion of the prison authorities, who developed the practice of requiring such correspondence to be translated at the prisoners' expense. The Court considers that such a practice, as applied in this case, is incompatible with Article 8 because it automatically excludes from the protection afforded by that provision an entire category of private correspondence which prisoners might wish to use.

60. The adoption of a ministerial circular apparently aimed at removing any restriction on letters written in a language other than Turkish does not alter that finding, as the circular concerned was adopted in 2009 and post-dates the facts complained of (see paragraph 34 above).

61. The Court accordingly holds that there has been a violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

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

...

Done in French, and notified in writing on 11 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President