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HIGHLIGHTS

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Contributors to this issue
Pierre d'Argent & Olivier Lhoest (Belgium)
H.H. Dr. S.B. Domah (Mauritius)
Christopher Ram (Canada)

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Editor
Matthew Happold

Editorial Offices
Charles Clore House
17 Russell Square
London WC1B 5DR
Telephone: (+44) (0)171 636 5802
Fax: (+44) (0)171 323 2016
Email: *biicl@biicl.org.uk*

European Countries

BELGIUM

Crimes against humanity - the crime of genocide - universal jurisdiction - immunity:

The Law of 10 February 1999 gives universal jurisdiction to Belgium courts in cases of crimes against humanity and genocide.

This law, "relating to grave breaches of international humanitarian law", amends and completes the Law of 16 June 1993 relating to grave breaches of the 1949 Geneva Conventions and the 1977 Additional Protocols. The law makes genocide, as defined by the 1948 Genocide Convention, and crimes against humanity crimes in Belgium law. Crimes against humanity are defined by reference to the Statute of the International Criminal Court (which is not, as yet, in force).

The law also introduces a new paragraph 3 into Article 5 of the 1993 Law, stating that "The immunity attached to the official quality of a person does not prevent the application of the present law".
Moniteur belge, 23.3.99.

Participation in a criminal organisation:

The Law of 10 January 199 introduces into the Penal Code the notion of "criminal organisations" and criminalises membership of such an organisation, taking part in its illegal activities, taking part in its decisions and of directing it. Consequently, a person could be held criminally liable for the simple fact of belonging to a criminal organisation, even if he did not participate in its illegal activities.

The existence of a criminal organisation allows an investigating magistrate to

use otherwise restricted methods of investigation (such as phone tapping). As a consequence, the Law has raised serious controversy within the legal community and amongst human rights activists.
Moniteur belge, 26.2.99.

Oil pollution - 1992 London Protocols:
Belgium has ratified the 1992 London Protocols to the 1969 Convention on Civil Liability for Oil Pollution and the 1971 Convention Establishing an International Fund for the Compensation of Oil Pollution Damages.
Moniteur belge, 16.3.99.

1980 Child Abduction Convention:
Belgium has ratified the 1980 Hague Convention on the Civil Aspect of International Child Abduction.
Moniteur belge, 24.4.99.

Arbitration:
The Law of 19 May 1998 has modified the rules relating to civil and commercial arbitration.

The law states that any natural or juridical person has the capacity or the power to enter into arbitration agreements. Public law bodies may enter such agreements if they relate to the implementation of a contract or another agreement to which they are party.

The law gives arbitral tribunals the capacity to order interim measures. With the agreement of the parties to the arbitration a third party may intervene in the arbitral procedure, or may be asked to intervene by one of the original parties.
Moniteur belge, 7.8.98. Pd'A & OL

PORTUGAL

Employment law - sex discrimination:
Law No. 105/97 of 13 September 1997 has established a new regime to enforce the right to equality in the treatment of men and women at work.

The law permits trades unions, in addition to aggrieved individuals, to bring claims alleging discriminatory practices.

The burden of proof is reversed in relation to such allegations; the employer must prove that the impugned practises were not discriminatory. In addition, the courts may take into account as the relevant factor the proportion of men to women in the relevant company or profession when making their determinations as to whether a practice is discriminatory.

All employers, both in the public and private sectors, must retain records of their recruitment procedures for a period of five years. These must include copies of the job advertisements and job descriptions, the number of applications made and of interviews held, and the results of any selection tests. Failure to keep such records is a fineable offence.

Discriminatory practises are also fineable offences. In addition, any company found to have engaged in such practices must post a copy of the decision in all of its offices for a 30 day period. Such decisions are also published in one of the main newspapers.
Barros, Sobral, G. Gomes & Associados, *Newsletter*, March/May 1999.

Taxation:
Decree Law No. 398/98 of 17 December 1998 enacted the long-awaited General Tax Law. In addition, two decree laws have been published to complement the GTL: the Tax Inspection Proceedings Complementary Regime (annexed to Decree Law No. 413/98 of 31 December 1998) and the Special Tax Inspection Requested by Taxpayers Regime (Decree Law No. 6/99 of 8 January 1999).

The GTL, in force from 1 January 1999, not only consolidated a number of widely dispersed rules into one law, but also introduced a number of new rules.

The secondary liability rules applicable to company board members and official accountants were changed. Secondary liability now applies throughout the entire tax payment cycle and not only during the period in which those persons are in office.

The limitation rule for tax assessment was changed from five to four years. The right to collect taxes was reduced from ten to eight years. However, new rules on the suspension of the limitation rules were introduced. In addition, rules on indirect methods to determine taxable income were introduced.

For the first time, a taxpayer, or another on his behalf, may demand a tax inspection. Taxpayers are also now entitled to be heard by the authorities before an assessment.
Arthur Andersen (Portugal), *Tax Flash*, No. 3, Março 1999.

United Kingdom

ENGLAND AND WALES

Defamation - Defamation Act 1996 - whether internet service provider a publisher:
Morland J, sitting in the Queen's Bench Division of the High Court of Justice, has held that where an internet service provider which had received and stored a posting on its news server, transmitted that posting to its subscribers who wished to download it, the ISP was a publisher of the posting at common law, but not for the purposes of section 1(2) and (3) of the Defamation Act 1996.
Godfrey v Demon Internet ltd.
Times, 20.4.99.

Asylum - housing - National Assistance Act 1948 - whether council under duty to house violent asylum seeker:
Scott Baker J, sitting in the Queen's Bench Division, has held that where a destitute asylum seeker has been evicted from two lodgings by different accommodation managers because of his behaviour, a local council was under no mandatory obligation to meet his continuing need for accommodation under section 21(1) of the National Assistance Act 1948.

A discretionary power existed under section 47(1) of the National Health Service and Community Care Act 1990, and in reaching any decision the local council was entitled to take into account evidence of those evictions.
R v Kensington & Chelsea London Borough Council, ex parte Kutjim.
Times, 20.4.99.

Criminal law - private prosecution - judicial review - powers of DPP - powers of police authority:
The Divisional Court of the Queen's Bench Division (Laws and Creswell LJJ and Latham J) has dismissed in part an application by two retired police officers for judicial review of a decision of the Director of Public Prosecutions not to take over private prosecutions commenced against them for the purposes of discontinuing those proceedings.

Both officers had made representations to the DPP that he should exercise his power under section 6(2) of the Prosecution of Offences Act 1985 to take over the conduct of the proceedings and then discontinue them under section 23(3) of that Act, but the DPP had declined to do so.

The Court held that the decision of the DPP was not unlawful. The DPP's policy that he would intervene where there was clearly no case to answer was not unlawful, nor had it been unlawfully applied.

The Court allowed applications by the Chief Constable and the two former police officers for judicial review of a decision of the South Yorkshire Police Authority that it has no legal power to provide financial assistance to the former officers in respect of the costs and expenses of defending the private prosecutions or bringing judicial review proceedings against the DPP.

A police authority's powers were not limited to those specifically conferred upon it, since it was empowered to do anything which reasonably supported the general function conferred by section 6(1) of the Police Act 1996 "to secure the maintenance of an efficient and effective police force for its area".
R v Director of Public Prosecutions, ex parte Duckenfield & Another; R v South Yorkshire Police Authority & Another, ex parte Chief Constable of South Yorkshire & Others.
Times, 21.4.99.

Criminal law - evidence - witness confrontation - whether police can use reasonable force:
The Court of Appeal, Criminal Division (Beldam LJ, Astill and Gray JJ) has held that there is no power enabling the police to use reasonable force to make a suspect submit to a confrontation by a witness.

The mere fact that the Secretary of State had included in Code C of the Police and Criminal Evidence Act 1984 (s. 66) Codes of Practice a requirement that reasonable force might be used to secure conditions of detention did not, in their Lordships' view, authorise the use of force, reasonable or otherwise, to bring about a confrontation.
R v Jones (Derek); R v Nelson (Gary). *Times*, 21.4.99.

The Commonwealth

CANADA

Criminal law - rule of law - abuse of process - legality of "reverse sting" operations by police - solicitor-client privilege:

A recent judgment of the Supreme Court of Canada has considered whether police may commit offences to further investigations, what remedies are open to the accused in such cases, and the extent to which legal advice obtained by the police is shielded by solicitor-client privilege.

The police had sold the appellants a large quantity of narcotics in a "reverse sting" operation and, prior to actual delivery of the drugs, had charged them with conspiracy to traffic in narcotics. The appellants, having been found guilty, asked for a stay on the basis that for the police offer to sell the narcotic was itself an offence amounting to an abuse of process. The Crown argued that the police actions had been taken only after seeking legal advice and were therefore in "good faith" even if later found illegal, but claimed solicitor-client privilege in relation to the advice.

The Supreme Court found that the conduct of the police clearly amounted to "trafficking" contrary to the Controlled Drugs and Substances Act, which specifically included offering for sale within the offence. Their motive in offering the drugs and intention not to deliver them was irrelevant. Since the offence included offering for sale, the *mens rea* was not the intent to deliver the drugs, but the intent to offer them, and the offence was therefore complete.

Crown immunity did not apply in this case. While police officers may act as agents of the Crown in some functions, this was not the case with the investigation of crime. It was clear from the case law that investigative powers arose directly from the office held by the police and not from any delegation. Further, had an agency relationship existed, the commission of an offence would have been outside the scope of the agency. Finally, the exemption of the police from narcotics offences was a matter for Parliament (which had created exemptions from some other offences in the Act). Legislators, and not the courts, should be left to determine the nature and scope of any immunity and the circumstances in which it should apply.

Police illegality was not sufficient to establish abuse of process, however. The purpose of the doctrine of abuse of process was not to protect the accused, but to protect the integrity of the judicial system from disrepute. It was for the court in each individual case to consider all the circumstances, of which police illegality was only one, to determine whether police or prosecutorial conduct "shocks the conscience of the community".

The advice given to the police, and whether they had followed it, establishing some degree of "good faith", was one of the other circumstances to be considered. The advice was privileged, but this privilege was waived when the Crown argued "good faith", and the advice must therefore be disclosed. As with other elements of their investigation, the police had not acted as Crown agents in seeking the advice, but this was not essential to the claim of privilege. The police, acting within the scope of their duties, had sought advice of a legal nature from counsel, who had given it in the context of a solicitor and client relationship, and the advice was therefore privileged. Such privilege could be lost where the advice facilitated conduct known to the client to be illegal or where counsel had become involved in the commission of an offence as a "dupe or conspirator", but that was not the case here. The police had clearly believed at the outset that the proposed "reverse sting"

was legal and had sought advice with a view to ensuring that no crime would be committed. The limits on solicitor-client privilege were not intended to prevent clients from ascertaining whether a proposed course of conduct was legal or not before engaging in it.

In the case at bar, however, there had been a waiver of the privilege. When the Crown argued that the police acted in "good faith", it was, in effect, arguing that the police had been advised that the course of conduct they subsequently pursued was legal. The Crown could not argue good faith reliance on the advice and subsequently rely on privilege to shield the advice itself from the defence. The Crown therefore ordered disclosure of the advice and a rehearing of the application for a stay.

R v Campbell, Supreme Court of Canada, 22.4.99, File No. 25780.

Criminal procedure - search and seizure - interpretation of power to issue search warrant:

The Supreme Court of Canada has ruled that a statutory power to issue warrants to search for "... anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence ..." does not limit the scope of warrants or searches to evidence of an element of the offence which is part of the Crown's *prima facie* case.

The use of the words "with respect to" indicated a clear intention by Parliament to create a broad power to search for any evidence relating to the culpability of a suspect, which included evidence relating to potential defences, such as due diligence, even if this would not necessarily be raised at the trial. This was not a case of ambiguity where extrinsic materials or other aids to interpretation need be resorted to. In such cases, the federal Interpretation Act requires the courts to give the statutory language a "liberal and purposive" interpretation.

It was clear that the purpose of the federal Criminal Code was to "promote a safe, peaceful and honest society" by creating offences and powers to investigate those offences. The use of search warrants was a significant investigative power, usually employed at a stage where it was not entirely clear to investigators what had occurred, whether it was an offence, and if so who might be culpable. At this stage it was necessary to the purposes of the statute that the police be given the power to seize both inculpatory and exculpatory evidence in order to preserve it, a function which would be inconsistent with a narrow interpretation of the statutory power to issue warrants. Moreover, limiting the police's powers to the seizure of evidence which inculpated only the target of an investigation was inconsistent with their obligation to obtain and consider exculpatory evidence in order to develop alternative investigative theories or suspects and could lead to miscarriages of justice.

CanadianOxy Chemicals Ltd v Canada (Attorney General), Supreme Court of Canada, judgment 10.12.98, reasons delivered 23.4.99, File No. 25944.

Criminal law - sentencing - application of statutory sentencing principles governing aboriginal offenders:

A recent judgment of the Supreme Court of Canada has for the first time laid down principles for applying a 1996 Criminal Code amendment dealing with the sentencing of aboriginal offenders. The amendment formed part of a 1995 comprehensive sentencing package which took effect in September 1996. In addition to providing fundamental principles for sentencing and listing a number of aggravating and mitigating factors, paragraph 718.2(e) of the Code provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders".

The Court found that this principle was remedial, and not merely a codification of existing sentencing principles. It was intended to remedy the historic over-incarceration of aboriginal people in Canada and to ensure that aspects of aboriginal life or culture which might have been a factor in the commission of the offence or which might bear on the effectiveness of incarceration as a response were taken into

consideration by the courts. The Court termed the over-incarceration of aboriginal people, who comprise 2% of the population but about 10% of the prison population, a "crisis" in the criminal justice system which Parliament had by its enactment called upon the courts to address to the extent that this was possible in the sentencing process. The judgment sets out a comprehensive framework for applying paragraph 718.2(e), but notes that it does not necessarily warrant lesser sentences for aboriginal offenders and should not be used by the courts to reduce the number or lengths of sentences imposed by any form of "reverse discrimination".

The Court concluded that the sentencing court was in error in not considering the appellant's aboriginal circumstances, but declined to overturn the sentence imposed. Generally, the more serious the offence the more weight would be given to other sentencing principles, according aboriginal factors less overall importance in the outcome. This was a case of manslaughter described as a "near murder" in which the appellant had fatally stabbed her husband a second time while pursuing him as he fled from her initial attack. There was no evidence of spousal abuse on his part, and other factors, both aggravating and mitigating, had been considered. Under the circumstances, it could not be said that the punishment of three year's imprisonment was inappropriate or excessive.
R v Galdue, Supreme Court of Canada, 23.4.99, File No. 26300.

Constitutional law - human rights - criminal procedure - detention, search and seizure - whether detention of suspected drug smuggler until he excreted narcotics amounted to "unreasonable search" or an interference with security of the person contrary to the Canadian Charter of Rights and Freedoms:
The Supreme Court of Canada has held that the detention of a person suspected of having ingested narcotics until the suspect has either been cleared by a urine test or normal excretion or until he excretes ingested packages of narcotics does not infringed the suspect's Charter rights.

The search was not unreasonable. Normal standards of privacy in Canada require that the police have reasonable and probable grounds to believe that evidence of an offence will be recovered before a search is authorised, but this expectation is diminished when the subject is entering Canada from another country. In this case, the Customs Act requirement of "reasonable suspicion" that the respondent had ingested drugs was sufficient. The respondent's inability to explain the reasons for his travel, inconsistent information given to customs officers and other factors were sufficient to justify his detention. The statutory power to search a traveller for contraband concealed "... on or about his person ... within a reasonable time ..." of entry to Canada included the power to search the respondent for drugs concealed within his body, and the method employed, while embarrassing, was the least intrusive way of doing so. Normally, searches should be conducted within 30 minutes of entry, but this must be considered in the context of the type of search, and a longer delay was inevitable in cases where it was necessary to wait for the suspect to ingest the narcotics.

In many cases of this nature, it would be prudent to hold the suspect under medical supervision, but the failure to do so did not amount to an infringement of his right to security of the person. Customs officers had kept the respondent under supervision and there was no indication that his health or safety was in any danger.
R v Monney, Supreme Court of Canada, 23.4.99, File No. 26404. CR

MAURITIUS

Public procurement:
The National Assembly of Mauritius has recently passed the Public Procurement Transparency and Equity Act 1999. The new Act modernises the system of public procurement. It is intended to take into account the development needs of Mauritius and to harmonise them with the country's international obligations, especially under the World Trade Organisation.

The Act makes separate provision for the public procurement of goods, works and services. It introduces principles of

greater accountability, increased transparency and equity into public purchasing. It imposes clear and recorded decision-making processes. It provides for an independent review of procurement decisions, and for conciliation and settlement mechanisms in cases of disputes.

Part I of the Act lays down the terms, sets out the important stages and defines the institutions which are critical to a public solicitation as per the Act. Part II sets out in greater detail the principles and steps that should be followed in all public procurement matters. Part III lists the mandatory stages of a procurement exercise in relation to public purchasing of goods or works. Part IV creates a special regime where the request is for services.

Part V provides for the setting up of Opening Committees and sets out their roles and functions. Part VI establishes Evaluation Committees. Part VII sets up a Committee of Needs, the purpose of which is to plan for the purchase of general items.

Part VIII enables the creation of procurement units within each public body under the responsibility of the supervising officer or chief executive. In all cases, standard forms, established procedures and statutory amounts are to be observed.

Part X sets up a Public Procurement Commission, the members of which are appointed by the President of the Republic, acting in accordance with the Prime Minister after the PM has consulted the Leader of the Opposition. The Commission has a supervisory as well as a regulatory role in public procurement matters.

Part XI enables a public body to determine a preference margin that can be given in certain cases to domestic suppliers. It also provides for an open system whereby members involved in procurement matters are bound to declare their assets. Provisions also give a right to the general public to have access to texts, records, rules and regulations that may be relevant to any public purchase.

Part XII provides for the setting-up of a Pre-investment Committee to deal with matters where the use of public funds becomes necessary for any investment project. A duty is imposed on officers for the speedy preparation of bids and award of contracts, especially for investment projects. The Act also provides for a statutory supervision of the works, delivery of services and contract management.

In relation to any disputes that may arise, Part XIII sets up a mechanism whereby dispute settlement is encouraged through conciliation rather than litigation.. The section makes it possible for the public body to retrieve traceable assets in cases of collusion and bid-rigging. Bid-rigging is itself made a criminal offence.

Part XIV makes provision for penalties in cases of breach of the Act. Transitional provisions exist to ensure a smooth transition from the Central Tender Board Act 1995, which the present Act repeals.

SBD

European Union

COUNCIL OF THE EUROPEAN UNION

Common position - liability for defective products - approximation of the laws, regulations and administrative procedures of the Member States:

On 17 December 1998 the Council of the European Union adopted a Common Position on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products with a view to the adoption of a Directive of the European Parliament and the Council on the subject.

It is intended that the proposed directive amend Directive 85/374/EEC (*OJ* 1985 L 210) by including primary agricultural products within the scope of that directive.

OJ 1999 C 49, 22.2.99.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Free movement of capital - Article 73b, EC Treaty - national prohibition on the creation of a mortgage in a foreign currency:

The European Court of Justice, ruling on a reference under Article 177 of the EC Treaty by the *Oberster Gerichtshof* (Austria) for a preliminary ruling on the interpretation of Article 73b of the Treaty, has held that the article precludes the application of national rules requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

Manfred Trummer, Peter Mayer (Case C-222/97), 16.3.99.

Freedom of establishment - establishment of a branch by a company not carrying on any actual business - circumvention of national law:

The European Court of Justice, ruling on a reference under Article 177 by the *Højesteret* (Denmark) for a preliminary ruling on the interpretation of Articles 52, 56 and 58 of the EC Treaty, has held that it is contrary to Articles 52 and 58 for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital.

The Court further held, however, that that interpretation does not prevent the authorities of the Member State concerned from adopting any appropriate measures for preventing or penalising fraud, either in relation to the company itself, if need be in co-operation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

Centros Ltd v Erhvervs- og Selskabsstyrelsen (Case C-212/97), 9.3.99.

EEC-Morocco Co-operation Agreement - principle of non-discrimination as regards working conditions or remuneration - refusal to extend residence permit, bringing to an end the employment of a Moroccan worker in a Member State:

The European Court of Justice has ruled on a reference under Article 177 of the EC Treaty by the Immigration Adjudicator (UK) for a preliminary ruling on the interpretation of Article 40 of the Co-operation Agreement between the EEC and the Kingdom of Morocco, concluded on behalf of the Community by Council Regulation (EEC) No. 2211/78 of 26 September 1978 (*OJ* 1978 L 264).

The Court held that the first paragraph of Article 40 ("The treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals") is to be interpreted as not precluding in principle a host Member State from refusing to extend the residence permit of a Moroccan national whom it has authorised to enter its territory and to take up gainful employment there, for the entire period during which he has that employment there, where the initial reason for the grant of his leave to stay no longer exists by the time that his residence permit expires.

The Court held that the situation would be different only if, in the absence of grounds relating to the protection of a legitimate national interest, such as public policy, public security or public health, that refusal were to affect the right actually to engage in employment conferred on the person concerned by a work permit duly granted by the competent national authorities for a period exceeding that of his residence permit. It was for the national court to determine whether that was the case.

Nour Eddline El-Yassini v Secretary of State for the Home Department (Case C-416/96), 2.3.99.

Council Directive 96/664/EC - promotion of linguistic diversity of the Community in the information society - legal basis:
The European Court of Justice has ruled on an application by the European Parliament under Article 173 of the EC treaty for the annulment of Council Directive 96/664/EC of 21 November 1996 on the adoption of a multi-annual programme to promote the linguistic diversity of the Community in the information society (*OJ* 1996 L 306) on the ground that the legal basis of that decision should have been not only Article 130 of the EC Treaty but also Article 128.

The parliament's action was based on the view that the Community's linguistic wealth forms part of the cultural heritage which the Community is responsible for conserving and safeguarding in accordance with Article 128(2). The Council contended that the logic of the programme was above all economic and industrial.

The Court held that the object of the programme, namely the promotion of linguistic diversity, was seen as an element of an essentially economic nature and incidentally as a vehicle for or element of culture as such. It was not disputed that the programme would have beneficial effects for the dissemination of cultural works, but these were indirect and incidental effects as compared with the direct effects sought, which were of an economic nature, and did not justify basing the decision on Article 128 of the Treaty as well. Accordingly, the action was dismissed.
European Parliament v Council of the European Union (Case C-42/97), 23.2.99.

Social security - income support - conditions of entitlement - habitual residence:
The European Court of Justice, ruling on a reference under Article 177 by the Social Security Commissioner (UK) for a preliminary ruling on the interpretation of Article 84 of the EC Treaty, has held that Article 10a of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended, read together with Article 1h thereof, precluded the Member State of origin - in the case of a person who has exercised his right of freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work - from making entitlement to one of the benefits referred to in Article 10a conditional upon habitual residence in that State, which presupposes not only an intention to reside there, but also completion of an appreciable period of residence there.
Robin Swaddling v Adjudication Officer (Case C-90/97), 25.2.99.

Equal pay - equal treatment - compensation for unfair dismissal:
The European Court of Justice has ruled on a reference under Article 177 by the House of Lords (UK) for a preliminary ruling on the interpretation of Article 119 of the EC Treaty and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (*OJ* 1976 L 39).

The Court held that a judicial award for compensation for breach of the right not to be unfairly dismissed constitutes pay within the meaning of Article 119.

The conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain compensation also fall within the scope of Article 119. However, the conditions determining whether an employee is entitled, in such circumstances, to obtain reinstatement or re-engagement fall within the scope of Directive 76/207/EEC.

The Court held that it is for the national court, taking into account all the material legal and factual circumstances, to determine the point in time at which the legality of a rule to the effect that protection against unfair dismissal applies only to

employees who have been continuously employed for a minimum period of two years is to be assessed.

In order to establish whether a measure adopted by a Member State has a disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.

If a considerably smaller percentage of women than men is capable of fulfilling the requirement of two year's employment imposed by the rule, it is for the Member States, as author of the allegedly discriminatory rule, to show that the rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim.

R v Secretary of State for Employment, ex parte Nicole Seymour-Smith & Laura Perez (Case C-167/97), 9.2.99.

International

EUROPEAN COURT OF HUMAN RIGHTS

Article 5(3) - right of detainee to be brought before a judge - investigating officer of prisoner on remand not "judicial" or independent - Article 5(4) - habeas corpus - review of detention by an investigating officer not sufficient to decide upon "lawfulness" of detention:

The applicant worked as a cashier and accountant in a State-owned enterprise. A 1995 audit revealed a cash deficit, and the report contained an opinion that the applicant had made deliberately false entries in the accounting books and had misappropriated funds.

The applicant was charged and detained on remand on 24 October 1995. In February 1996 detention on remand was discontinued in view of the applicant's health problems. The applicant complained that after her arrest she had not been brought before a judge or other officer authorised by law to exercise judicial power.

The European Court of Human Rights found that following her arrest the applicant was brought before an investigator who did not have power to make a binding decision as to her detention and was not procedurally independent from the prosecutor. Moreover there was no legal obstacle to his acting as a prosecutor at the applicant's trial. There was therefore a violation of Article 5(3) of the Convention.

The applicant also asserted that Article 5(4) of the Convention had been violated on account of the alleged formal character of the judicial review of her detention, the inadequate procedure and the impossibility to obtain a periodic control of lawfulness. Furthermore, the prosecutor, unlike the applicant, had full access to the case file and submitted to the court written comments to which the applicant was unable to reply.

The Court found that the case being examined *in camera*, with the burden of proof upon the applicant, and the applicant being unable to comment upon the prosecutor's submissions, there was also a breach of Article 5(4).

Nikolova v Bulgaria, 25.3.99.

Article 5(4) - habeas corpus - undue delay in the review of detention of patient in mental institution:

The applicant was investigated on suspicion of the manslaughter of his wife. In October 1987 he was examined by a medical panel who found that, on health grounds, he could not be held criminally responsible and also that he posed a threat to public order. Criminal proceedings were discontinued, but the Regional Court committed the applicant to a mental institution. Various requests for release were made, but these were all rejected on the basis of the assessments of psychiatrists working at the institution where the applicant was being held. An assessment by psychiatrists at Cracow University in 1994 confirmed that the applicant should be de-

tained. The applicant was released in June 1997.

The applicant complained that there was a breach of his right to have his detention reviewed. The European Court of Human Rights noted that it took one year, eight months and nine days for the applicant's request to have his detention reviewed to be judicially considered. That he had specifically requested examination by psychiatrists at Cracow University did not mean that he had forfeited his right under Article 5(4). The applicant had twice brought the delay to the court's attention. Moreover, the court's decision was based upon an examination that had taken place 11 months previously. There was, therefore, a breach of Article 5(4) of the Convention.
Musial v Poland, 25.3.99.

INTERNATIONAL COURT OF JUSTICE

***Land and Maritime Boundary between Cameroon and Nigeria* - request for interpretation - request declared inadmissible:**

On 25 March 1999 the International Court of Justice declared inadmissible Nigeria's request for interpretation of the judgment delivered by the Court on 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections*. The decision was taken by 13 votes to three.

The Court held that, by virtue of Article 60 of its Statute, it had jurisdiction to enter request for interpretations of any judgment rendered by it. It followed, therefore, that a judgment on preliminary objections, just as a judgment on the merits, could be the subject of such a request.

The Court also held that any such request must relate to the operative part of the judgment and cannot concern the reasons for the judgment, except insofar as they are inseparable from the operative part. Nigeria's request met those conditions and the Court had jurisdiction to entertain it.

However, the Court held that it would be unable to entertain Nigeria's request without calling into question the effect of the judgment concerned as final and without appeal, or to examine submissions seeking to remove from its consideration elements of law and fact which, in its judgment of 11 June 1998, it had already authorised Cameroon to present. Accordingly, the request was inadmissible.
International Court of Justice, *Press Communiqué No. 99/13*, 22.3.99.