ReSPA

Regional School
of Public Administration

STUDY ON THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS APPLICABLE IN ADMINISTRATIVE DISPUTES

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Study on the Case-Law of the European Court of Human Rights Applicable in Administrative Disputes

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The Regional School of Public Administration (ReSPA) is an inter-governmental organisation supporting regional cooperation of public administrations in the Western Balkans. Its activities are supported by the European Commission (EC), and co-funded through annual contributions of the ReSPA Members. ReSPA Members are Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia, while public servants from Kosovo* participate in ReSPA activities funded by the European Commission.

The Purpose of ReSPA is to support governments in the Western Balkan region develop better public administration, public services and overall governance systems for their citizens and businesses, and prepare them for membership in the European Union.

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* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and ICJ Advisory Opinion on the Kosovo Declaration of independence

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Chapter 1: INTRODUCTION

BACKGROUND

The Regional School of Public Administration (ReSPA) is an inter-governmental organisation for enhancing regional cooperation, promoting shared learning and supporting the development of public administration in the Western Balkans. ReSPA Members are Albania, Bosnia and Herzegovina, Macedonia[1], Montenegro and Serbia. Public servants from Kosovo* participate in ReSPA activities financed by the European Commission. ReSPA's purpose is to help the governments in the Western Balkan region develop better public administration, public services and overall governance systems for their citizens and businesses, and prepare them for membership in the European Union.[2]

In accordance with the European Principles of Public Administration related to Accountability[3], ReSPA's activities contribute to the development of administrative justice in the Western Balkan countries, by supporting ReSPA Members and Kosovo* in the assessment and application of European principles and standards in this field. Having in mind that (a) the jurisprudence of the European Court of Human Rights ("ECtHR", "the Court") has become a significant source of procedural and substantive law standards of administrative justice imposing obligations upon Member States with respect to the relationship between individuals and state powers; and (b) that all ReSPA Members are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention on Human Rights", "the Convention"), ReSPA supported the preparation of this Study with an aim to present and explain the leading Court's cases on administrative disputes and bring them closer to the local public officials, administrative court judges and legislators, who have an obligation to apply the Convention on a daily basis.

1 The former Yugoslav Republic of Macedonia is ReSPA Member as Macedonia.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Advisory Opinion on the Kosovo Declaration of independence.

2 See more at http://www.respaweb.eu

3 See more at http://www.sigmaweb.org/publications/principles-public-administration.htm

The Study on the Case-Law of the European Court of Human Rights Applicable in Administrative Disputes ("the Study") has been prepared by the following experts: Professor Violeta Beširević, Lead Expert, edited the Study and wrote the Introduction and Chapters 4 and 7; Professor and former judge of the ECtHR Dragoljub Popović wrote Chapter 8 and the comments and case briefs of *Guiso-Gallisay* v. *Italy* and *Grudić v. Serbia* included in Chapter 5; Professor Migena Leskoviku wrote Chapters 2 and 3; and Associate Professor Tanasije Marinković wrote Chapters 5 and 6.

A SHORT NOTE ON THE LAW OF THE CONVENTION

The European Convention on Human Rights is an international instrument for human rights protection adopted in 1950 in response to gross human rights violations during World War II and in an attempt to unify post-war Europe. When it came into force in 1953, it made certain rights embodied in the Universal Declaration of Human Rights (1948) "practical and effective" for the first time. The Convention was envisaged as a traditional international document, protecting mostly civil and political rights, with subsidiary effect, which implied that the States had the primary responsibility to enforce the Convention.[4]

Much has happened since. First, the number of Contracting States increased from 10 in 1953 (the requirement for its entry into force) to 47 in 2008 – practically all Council of Europe Member States have ratified the Convention. Second, law of the Convention has significantly grown. At present, it comprises of the Convention and 16 Protocols thereto[5], many of which refer to the protection of rights not envisaged in the original text of the Convention, while others reform the enforcement mechanisms. Protocols adding rights to the Convention are binding only upon the States that have ratified them. However, law of the Convention has most significantly evolved through its interpretation by the Court.

One should note that the Convention neither refers directly to social, economic and cultural rights, nor directly secures all civil and political rights, including *e.g.* minority rights, the right to recognition as a person before the law and freedom from racist or other propaganda. Some of these limitations are, however, remedied in the Court's case-law.[6]

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4 For more see Harris, D. J., et al., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 3rd edition, Oxford, Oxford University Press, 2014, pp. 5–8.

5 Two other Protocols, Protocol No. 15 and Protocol No. 17, have not entered into force yet.

6 Harris, et al, *op. cit.*, pp. 5–6.

Third, the Convention has acquired the status of the "European constitutional bill of rights"[7] and "an instrument of European public order"[8] which imposes "objective obligations" upon the Member States. To a large extent, such a development has occurred due to the interpretative role of the Court, which has become "the body, the soul and the spirit" of the Convention. Namely, under Article 34 of the Convention, "[T]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto [...]." In addition, in so-called inter-state cases, the Court also receives state applications regarding "any alleged breach of the provisions of the Convention and the Protocols thereto [...]".[9]

A key role of the Court is the interpretation of the Convention. Having in mind that the protection of individual human rights is the object and the purpose of the Convention, the Court has employed a dynamic or evaluative interpretation starting from the fact, as it stated in *Tyrer v. the United Kingdom*, that the Convention is "a living instrument which [...] must be interpreted in the light of present-day conditions."[10] In addition to treating the Convention as "a living instrument", the Court has also given autonomous meaning to the legal terms employed in the Convention, which does not necessarily correspond to their meaning in national law. This approach is particularly visible in the Court's interpretation of the terms "tribunal", "civil rights and obligations", "criminal charge" and "property".

The Court's "living instrument doctrine", as well as its specific interpretation of the legal terms in the Convention, have influenced many changes in the national laws in Europe, including the abolition of corporal punishment in UK schools, the prohibition of discrimination against children born out of wedlock in Belgium, the abolition of military judges in the Turkish court system, decriminalisation of homosexual acts in Ireland, and amendments to Dutch law on the detention of patients with mental illnesses.[11]

However, one of the key doctrines developed by the Court – the margin of appreciation doctrine – indicates that primary responsibility for the protection of human rights, enshrined in the Convention, lies with the Member States: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the

7 *Ibid*., p. 8.

8 *Loizidou v. Turkey (Preliminary Objections),* App. no. 15318/89, Judgment of 23 March 1995, para. 75.

9 See Article 33 of the Convention.

10 *Tyrer v. the United Kingdom*, App. no. 5856/72, Judgment of 25 April 1978, para. 31.

11 See more at http://www.coe.int/en/web/human-rights-convention/general-measures

international judge to give an opinion on the exact content of [...] requirements [...]. Consequently, Article 10 para. 2 [...] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator [...] and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force [...]".[12] In other words, subject to ECtHR's supervision, Contracting States enjoy a certain degree of discretion when they undertake legislative, judicial or administrative action in the field of Convention rights. Finally, it needs to be emphasised that since the Convention was incorporated into laws of all Member States, law of the Convention has been developed in extensive dialogues between the national and the Strasbourg judges.[13]

State responsibility under the Convention applies to the acts of all public authorities, including the legislature, the government, the courts, police and other state bodies and agencies. One should bear in mind that lack of executive control over a particular body does not provide defence to the finding that individual rights have been violated, nor does the fact that the action or measure in question was in accordance with national law.[14]

Although the Court's judgments are "essentially declaratory", according to Article 41 of the Convention, the Court may award a victim "just compensation" – in terms of monetary compensation and legal costs.[15] The Court's judgments are binding on the parties to the case. However, the Court's jurisprudence has also "a deterrent effect" for the Contracting States that are not parties to a particular case or even for states that are yet to become a party to the Convention.[16] Thus, states have amended their law and policies to harmonise them with the Convention although they were not a party to a particular case, or even a Contracting State to the Convention. The abolition of the death penalty in all jurisdictions targeted in this Study illustrates this point well. Practically, a judgment of the Court in a specific case usually has an impact on all national jurisdictions bound by the Convention.[17]

The execution of the Court's judgments by the Contracting States is monitored by the Council of Europe Committee of Ministers, composed of

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12 *Handyside v. The United Kingdom*, App. no. 5493/72, Judgment of 7 December 1976, para. 48.

13 For more, see Helen Keller and Alec Stone Sweet, *A Europe of Rights,* Oxford, Oxford University Press, 2008; An illustration of the dialogue between international and national judges in the Western Balkan region is available *e.g.* in Violeta Beširević and Tanasije Marinković, "Serbia in a 'Europe of Rights': The Effects of the Constitutional Dialogue between the Serbian and European Judges", (2012) *24 European Review of Public Law 1*, pp. 401–430.

14 Bradley, A. W., "The European Convention on Human Rights and Administrative Law: First Impressions", (1983) *21 Osgoode Hall Law Journal 4*, p. 615.

15 Harris, et al, *op. cit.*, p. 29.

16 *Ibid.*, pp. 34–35.

17 *Ibid.*, p. 35.

the governmental representatives of all Member States. A judgment finding a violation of the Convention will result in general measures, such as amendments to legislation, and, if necessary, in individual measures.[18]

SCOPE AND STRUCTURE OF THE STUDY

Originally, the impact of the Convention in the field of administrative law was less significant than in the fields of criminal law and civil law.[19] Yet, as already noted, "[t]he Convention is concerned with the relationship between the individual and state power, as is administrative law".[20] It therefore comes as no surprise that, predominately due to the interpretative role of the Court, the Convention has gradually achieved the status of an important source for the protection of human rights in the field of administrative law and a tool for improving the horizontal harmonisation of the principle of administrative law in Europe.[21] For example, in 2007 alone, the French Council of State (*Conseil d'État*), which is the French supreme administrative court, delivered 102 decisions (including judgments and advisory opinions), in which it referred to the Convention as a legal source capable of resolving the dispute at issue.[22] One should note that the Convention is equally applicable in the protection of human rights in procedures conducted by public administrative bodies and in administrative disputes before administrative judicial bodies.

There are a number of administrative matters which the Convention applies to: administrative procedure and judicial review in which the right to a fair trial applies; data protection, which concerns the right to respect for private and family life; establishment and status of religious communities triggers the protection under the freedom of thought, conscience and religion; access to information held by public authorities involves the freedom of expression; banning of civic associations concerns the freedoms of assembly and association; expropriation procedures relate to the right to property; electoral disputes involve the right to vote and the right to stand for election; status of nationals and aliens (in particular, prohibition of the expulsion of nationals, prohibition of the collective expulsion of aliens, asylum, personal name, state registry, residence, citizenship) may concern the right to respect for private and family life, the right to liberty and security (prohibition of arbitrary

18 See more at http://www.coe.int/en/web/human-rights-convention/impact-in-47-countries

19 Silvia Mirate, "The ECtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe", (2012) *5 Review of European Administrative Law 2*, p. 48.

20 Bradley, *op. cit*., p. 613.

21 Mirate, *op. cit*.

22 *Ibid*., p. 54.

detention), freedom of movement, and prohibition of torture and inhuman or degrading treatment or punishment. General guarantees of the right to an effective remedy and the prohibition of discrimination are also applicable in administrative matters.

This Study focuses on substantive guarantees and fundamental procedural principles of administrative law developed by the Court in the fields of the right to a fair trial, data protection, freedom of information, protection of property, the right to free elections and expulsion of aliens.

Chapter 2 focuses on fair trial guarantees under Article 6 of the Convention applicable in administrative proceedings provided the outcome is decisive for the individual's private rights and obligations. This Chapter explains that the Court has interpreted Article 6 guarantees in terms of "fair administrative proceedings" in the context of judicial administrative proceedings, as well as in other administrative procedures that are not judicial under national law.

Chapter 3 deals with the right to data protection. Under Article 8 of the Convention, a right to protection against the collection and use of personal data forms part of the right to respect for private and family life, home and correspondence. As the Court has constantly highlighted, it is important that domestic law affords appropriate and sufficient safeguards in the system for the use, disclosure and retention of data, to ensure that the retention of personal data relating to the applicant's private life would not be inconsistent with or disclosed in violation of Article 8 of the Convention.[23]

Chapter 4 regards access to information held by public authorities. Access to state-held information is essential in a democratic society since it allows citizens to form a critical opinion of the society they are living in and facilitates their informed participation in democracy. This Chapter deals with the right of access to information protected under Article 10 of the Convention. It speaks about the idea of the freedom to seek and receive information, which generates the positive duty on the part of the state authorities to make available the information in their possession. The central part of the Chapter presents the concept of the right of access to information, together with the criteria for establishing whether refusal to provide the information can be regarded as "interference" with the right of access to information and the standards for determining whether the "interference" was justified.

Chapter 5 traces references to the protection of the right to property, safeguarded under Article 1 of Protocol No. 1 to the Convention. It starts with general observations regarding the structure of Article 1 of Protocol No. 1, the three limbs it contains and their interconnectedness. The scope of the

23 *Dimitrov-Kazakov v. Bulgaria*, App. no. 11379/03, Judgment of 10 February 2011.

right to property, both its including and excluding trends, is presented, with due attention paid to the fact that property is considered an autonomous concept in Convention case law. The Chapter goes on to explain all three modes of interference with property: deprivation of property, control of the use of property and interference with the peaceful enjoyment of property. It also outlines the conditions justifying interferences with property, notably those relating to lawfulness, legitimate aim and fair balance.

Chapter 6 focuses on the principles and standards of the Convention safeguarding the right to free elections. The right to free elections belongs to the group of political rights guaranteed by the Convention, together with the freedom of expression, and freedom of assembly and association. Affirming the need to interpret the Convention and its Protocols as a whole, the Chapter shows that the Court has recognised that there is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms.[24]

Chapter 7 explores the principles of the Convention applicable in proceedings related to the expulsion of aliens. Namely, the ongoing migration "crisis" indicates that standards of protection provided to aliens under the European Convention on Human Rights are needed more than ever. The following key provisions of the Convention prohibiting arbitrary expulsion of aliens are: Article 4 of Protocol No. 4 (protecting aliens against collective expulsion); Article 3 of the Convention (prohibiting inhuman and degrading treatment); Article 5(1)(f) (protecting aliens from arbitrary detention); Article 8 (protecting aliens from removal to safeguard their family life); and Article 13 of the Convention (concerning the availability of effective remedies that may prevent expulsion decisions in violation of the Convention). This Chapter sheds light on standards developed by the Court under each of the above-mentioned provisions.

Having in mind that the human rights protection standards in Europe have been developed in the dialogue between national and international judges to a considerable extent, Chapter 8 illuminates the reasoning of judgments in the light of the Court's jurisprudence. It aims to highlight specific elements of judicial technique, which can be distilled from the practices of the ECtHR, as useful topics for comparing national practices and discussions within the framework of the dialogue of jurisdictions.

Each Chapter is structured in the following manner: (I) Introduction; (II) Selected Cases: Comments and Case Briefs; and (III) List of ECtHR Cases Cited in the Chapter. Introductory remarks in each Chapter explain the key Convention principles and standards applicable in administrative disputes

24 *Ždanoka v. Latvia*, App. no. 58278/00, Judgment of 16 March 2006, para. 115.

regarding a particular subject of the Study. In order to illustrate the reasoning of the Court and to show the principles and standards developed by the Court and explained in the introductory part, each Chapter then provides the readers with short comments and briefs of the leading cases in that area. Note that the cases were selected not only with regard to their general importance, but also with regard to their impact in the jurisdictions targeted in the Study. The list of cases provides the reader with the possibility of directly accessing the relevant ECtHR case law.

THE WAY FORWARD

As already emphasised, knowing that the Contracting States have the primary responsibility to enforce the Convention and that ECtHR case-law is the key part of Convention law, the main purpose of this Study is to present and explain the leading ECtHR cases on administrative disputes and bring them closer to the local public officials, administrative court judges and legislators, who have an obligation to apply the Convention on a daily basis. In view of its commitment to the transfer of new knowledge and skills in the field of public administration, ReSPA may wish to consider maintaining its focus on the Court's work by providing updated and additional volumes of its case-law, in order to facilitate the creation of accountable, effective and professional public administration systems in the Western Balkans.

Violeta Beširević, 2 October 2017

Chapter 2: RIGHT TO A FAIR TRIAL: FOCUS ON ADMINISTRATIVE PROCEEDINGS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- *(b) to have adequate time and facilities for the preparation of his defence;*
- *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

I INTRODUCTION

This Chapter focuses on the right to a fair trial, enshrined in Article 6 of the Convention. The right to a fair trial is a very important principle and safeguard that means that persons (both natural and legal) can be sure that proceedings against them will be fair and just. It prevents governments from abusing their powers and protects people against injustice and guarantees that their voice is heard.[25] Without this right, the rule of law and public faith in the justice system would collapse as the right to a fair trial is one of the cornerstones of the rule of law and justice in a democratic society.

The right to a fair trial, of course, includes a variety of important standards already well established by the ECtHR in its abundant case-law. But, for the purpose of this Study and given the limitations of this research, this Chapter will focus on the application of fair trial standards in administrative proceedings, mainly on compliance with Article 6(1) of the European Convention on Human Rights. It, however, needs to be noted that this approach is not exhaustive as other provisions of this Article may apply in administrative proceedings as well.

Article 6 has been extensively interpreted by the Court in its case-law, which has contributed to a better understanding and implementation of the content of this article. To illustrate the reasoning of the Court and to show the principles upon which the right to fair trial has been construed by the Court, this Chapter also provides the readers with short comments, a summary and case briefs of *Vilho Eskelinen and Others v. Finland,*[26] *Stanka Mirković and Others v. Montenegro*[27] and *Ramos Nunes de Carvalho E Sá v. Portugal*.[28]

GENERAL OBSERVATIONS

Article 6(1) applies to administrative proceedings, provided the outcome is decisive for the individual's private rights and obligations.[29] Some disputes will, nonetheless, fall outside the scope of this Article where the state is

25 *Handbook for Monitoring Administrative Justice,* Folke Bernadotte Academy and Office for Democratic Institutions and Human Rights, OSCE/ODIHR, Poland, September 2013, pp. 36–38.

26 *Vilho Eskelinen and Others v. Finland,* App. no. 63235/00, Judgment of 19 April 2007.

27 *Stanka Mirković and Others v. Montenegro*, App. nos. 33781/15 and 3 others, Judgment of 7 March 2017.

28 *Ramos Nunes de Carvalho E Sá v. Portugal*, App. nos. 55391/13, 57728/13 and 74041/13, Judgment of 21 June 2016.

29 See *e.g. Emine Arac v. Turkey*, App. no. 9907/2, Judgment of 23 September 2008; *Ferrazzini v. Italy,* App. no. 44759/98, Judgment of 12 July 2001.

exercising its core public authority (such as tax issues[30]), where the state has clearly intimated its intention to exclude proceedings from its scope, and where political rights are concerned.[31] Thus, proceedings, which are considered as falling within the ambit of public law in a Contracting State or which are conducted before administrative courts, may still concern the determination of civil rights and obligations, wherefore they may give rise to issues under Article 6 of the Convention. Under the Convention, the term "civil rights and obligations" has an autonomous meaning, which is often different from the national definitions of those terms.

Although Article 6 enshrines the right to a fair trial, its guarantees often apply long before an individual initiates an administrative stage preceding the opening of judicial proceedings. These safeguards do not stop with the delivery of a judgment, but apply to the enforcement stage as well.

However, even when an administrative case does not fall under the purview of the civil rights and obligations covered by Article 6(1) of the Convention, issues under this Article may still arise if it needs to be ascertained whether the charge is criminal in nature. The following three criteria are to be taken into account: the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty.[32]

Considering the power and discretion of the administrative authorities, it is important that private persons have the right to appeal administrative decisions affecting their rights, liberties or interests, and that the government, public administration, must act within the scope of legal authority. Therefore, guaranteeing judicial review of administrative acts by a competent and independent authority/court that adheres to international and regional fair trial standards is fundamental to the protection of human rights and the rule of law.[33] A good illustration of that approach is given in the Court's judgment in the case of *Baka v. Hungary*, in which it ruled:

> "[...] In the present case, the premature termination of the applicant's mandate [...] was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law

30 *Ferrazzini v. Italy,* para. 29.

31 *Pierre-Bloch v. France,* App. no. 120/1996/732/938, Judgment of 21 October 1997, paras. 50–52. See also *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb),* Strasbourg, Council of Europe/European Court of Human Rights, 2013, pp. 11–12.

32 *Pierre-Bloch v. France,* paras. 53–59.

33 See *Baka v. Hungary,* App. no. 20261/12, Judgment of 27 May 2014. See also *Handbook for Monitoring Administrative Justice,* pp. 11–12.

> is doubtful [...]. Although its above findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance [...], the Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge [...]. Bearing this in mind, the Court considers that the respondent State impaired the very essence of the applicant's right of access to a court."[34]

Pursuant to Article 1[35] of the Convention, the Contracting States are obliged to organise their legal systems so as to ensure compliance with Article 6. Regardless of how a national judicial system is structured, certain fair trial requirements under universal and regional standards must be fulfilled. Compliance with Article 6 is ensured by putting in place substantive and procedural guarantees.[36]

Article 6 must be interpreted in the light of the present-day conditions, while considering the prevalent economic and social conditions, which is also known as the concept of "*the Convention as a living organism*".[37] In interpreting the Convention, the Court may also take into account relevant rules and principles of international law and EU law applicable in relations between the Contracting Parties, as it has done in various judgments.

RIGHT TO A FAIR TRIAL: SCOPE AND PROCEEDINGS BEFORE THE COURT

1. Judicial Construction of the Right to a Fair Trial

The Court found a violation of Article 6(1) in numerous cases where the applicants were deemed to have had an established right to a fair trial under domestic law (in particular based on a final court decision), but the authorities had failed to give effect to that right and its safeguards.

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34 *Baka v. Hungary*, para. 121.

35 Article 1 of the Convention reads: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*"

36 See for example *Boulois v. Luxembourg,* App. no. 37575/04, Judgment of 3 April 2012, paras. 102–103.

37 Dovydas Vitkauskas & Grigory Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights,* Strasbourg, Council of Europe, 2012, p. 7.

Article 6(1) applies both to civil and criminal proceedings, but the second and third paragraphs apply only to criminal proceedings. However, as the Court has noted in various cases, safeguards similar to those determined in Article 6(2) and (3) may under certain circumstances apply also to civil proceedings.[38] As already mentioned, this Chapter will not focus on criminal proceedings.

An application alleging violations of Article 6 will be declared admissible by the Court if all domestic remedies have been exhausted. This means that a case had been ruled on by the highest domestic courts before it reached the ECtHR. The State is under a positive obligation to take all the steps necessary to ensure that the right to a fair trial is guaranteed in practice as well as in theory. Not only judges, but other officials as well, are under the obligation to act in accordance with the requirements deriving from Article 6, to a standard which makes the fair trial safeguards "practical and effective".[39]

Where civil rights as defined by the Court's case-law are involved, everyone must have access to an independent and impartial tribunal established by law whose decisions cannot be subordinated to any non-judicial authority. Much of the Court's case-law has examined which safeguards need to be in place to guarantee access to a court. Once judicial proceedings are under way, they must normally be conducted in public and the judgment must always be pronounced publicly. They must also be concluded by the delivery of a reasoned judgment within a reasonable time and compensation must be paid for undue delays.[40]

Article 6 does not explicitly provide for a right of appeal. Even so, the Court has stated that when a State does provide in its domestic law for a right of appeal, these proceedings are covered by the guarantees in Article 6. The way in which the guarantees apply must, however, depend on the special features of such proceedings.[41]

Because of the nature of Article 6, the Court has very often considered it in conjunction with other Articles of the Convention (*i.e.* the right to private and family life, the right to an effective remedy, property rights, prohibition of torture and other forms of degrading or inhuman treatment or punishment, freedom of expression, etc.). Furthermore, the ECtHR has provided guidance on assessing and challenging *discriminatory practices* by authorities, thus considering Article 6 in conjunction with Article 14 of the Convention.[42]

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38 Nuala Mole & Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights,* Human Rights Handbook, No. 3, Council of Europe, 2nd Edition, 2006, p. 5.

39 *Ibid*., p. 7.

40 *Ibid.,* p. 6.

41 *Ibid*., p. 9.

42 See *e.g. Andrejeva v. Latvia*, App. no. 55707/00, Judgment of 8 February 2009.

While procedures or policies may not be directly discriminatory, they can be indirectly discriminatory where a difference in treatment occurs through disproportionately prejudicial effects of a general policy or measure against one gender, age (children) or "racial" or ethnic group[43] and the burden shifts to the respondent State to show that this difference in treatment is not discriminatory, but the result of objective factors unrelated to discrimination.[44]

Applicability of Article 6(1) under its civil head requires the cumulative presence of the following elements:

a) there must be a dispute;

b) over a "right" or "obligation" that must be of a "civil" nature; and

c) that right or obligation must have a basis in national law.

2. Scope of the Right to a Fair Trial: Concept of "Civil Rights and Obligations"

The concept of "*civil rights and obligations*" cannot be interpreted solely by reference to the respondent State's domestic law; it is an "*autonomous*" concept deriving from the Convention. Article 6(1) of the Convention applies irrespective of the parties' status, the character of the legislation which governs how the *dispute* is to be determined, and the character of the authority which has jurisdiction in the matter.[45]

The *dispute* must relate to "*rights and obligations"* which can be said to be recognised under domestic law. Lastly, these "*rights and obligations"* must be "*civil"* ones within the meaning of the Convention, although Article 6 does not itself assign any specific content to them in the Contracting States' legal systems.[46] In *Vilho Eskelinen and Others v. Finland*, the Court noted that:

> "[...] According to the principles enunciated in its case-law [...], the dispute over a "right", which can be said at least on arguable grounds to be recognised under domestic law, must be genuine and serious; it may relate not only to the actual existence of a

43 See *e.g. D. H. and Others v. the Czech Republic,* App. no. 57325/00, Judgment of 13 November 2007.

44 *D. H. and Others v. the Czech Republic* was the first case in which the Court found a violation of Article 14 of the Convention due to a pattern of racial discrimination in a particular sphere of public life, in the present case, in public primary schools. The Court noted that the Convention addressed not only specific acts of discrimination, but also systemic practices denying the enjoyment of rights to racial or ethnic groups – in this case the right of equal access to education to Roma children.

45 *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb),* p. 5.

46 *Ibid.,* pp. 5–6.

> right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question."[47]

In deciding whether there is a *"civil right"* and whether to classify a restriction as substantive or procedural, regard must first be had to the relevant provisions recognised under national law, principles governing the substantive right of action in domestic law, and how the domestic courts interpret them in a certain case. The Court has applied the distinction between substantive and procedural bars and limitations in the light of these criteria and considered whether a particular restriction was proportionate under Article 6(1).[48]

With regard to disputes over civil service employment – specifically relating to recruitment, careers and termination of service – the ECtHR initially deemed them to be, as a general rule, outside the scope of Article 6. However, in *Pellegrin v. France,*[49] the Court began to move away from this rule by adopting criteria to be applied on a case-by-case basis and focusing on the nature of the employee's duties and responsibilities. It went on to clarify the assessment criteria in *Vilho Eskelinen and Others v Finland:*

> "The Court can only conclude that the functional criterion, as applied in practice, has not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant is a party or brought about a greater degree of certainty in this area as intended [...] It is against this background and for these reasons that the Court finds that the functional criterion adopted in *Pellegrin* must be further developed. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement [...]."[50]

In *Vilho Eskelinen,* the Court noted that, according to its case-law, disputes between the State and its civil servants in principle fell within the scope of Article 6, except where two cumulative conditions were met. Firstly, the State in its national law must have expressly excluded access to a court for the

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47 *Vilho Eskelinen and Others v. Finland*, para. 40.

48 See for example *Z and Others v. the United Kingdom,* App. no. 29392/95, Judgment of 10 May 2001; *Osman v. the United Kingdom,* App. no. 87/1997/871/1083, Judgment of 28 October 1998. See also *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb),* p. 7.

49 *Pellegrin v. France,* App. no. 28541/95, Judgment of 8 December 1999.

50 *Vilho Eskelinen and Others v. Finland*, paras. 55–56.

post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest, meaning that: (i) there exists a special bond of trust and loyalty between the civil servant and the state; and (ii) the subject matter of the dispute at issue is related to the exercise of state power or has called into question the special bond. It is up to the State to prove that Article 6 is inapplicable.[51]

3. Existence of a "*Dispute"* over a Right or Obligation

The applicability of Article 6 firstly depends on the existence of the "*dispute"* in question. The dispute must be genuine and serious; it may relate not only to the actual existence of a right, but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play.[52] Thus, according to the so-called *Benthem* criteria,[53] Article 6(1) must involve a "dispute" over a right or obligation, a dispute that entails the possibility of a claim recognised under the domestic law on reasonable grounds. Such a dispute may require compliance with the following criteria:

- It must be given a substantive rather than a formal meaning;
- It may relate not only to the actual existence of a right, but also to its scope or the manner in which it may be exercised;
- It may concern questions of fact or law;
- It must be genuine and serious; and,
- It must be decisive for the applicant's rights, and must not have a mere tenuous connection or remote consequences.[54]

4. Existence of a Disputed Right in Domestic Law

The right in question must have a legal basis in domestic law, at least on arguable grounds.[55] Therefore, in principle the Court refers to domestic law in determining whether a right exists. In the Court's view, whether or not the authorities enjoyed discretion in deciding whether to grant the measure

51 *Ibid*., paras. 57, 62.

52 See *Micallef v. Malta,* App. no. 17056/06, Judgment of 15 October 2009, para. 74; *Boulois v. Luxembourg,* para. 90.

53 *Benthem v. the Netherlands,* App. no. 8848/80, Judgment of 23 October 1985, paras. 32–36. See also Vitkauskas & Dikov, *op. cit.,* pp. 11–12.

54 *Ibid.*

55 *Boulois v. Luxembourg*, paras. 90–94.

requested by a particular applicant may be taken into consideration and may even be decisive.[56]

As already mentioned and established in ECtHR's case-law, for Article 6(1) to apply there must be a *right in national law* which can be classified as civil in nature by the Court. However, the Court has considered certain limitations in the scope of Article 6(1) of the Convention. Considering the Court's approach to rule on each case on its particular circumstances, it has also declared that certain areas of law (such as taxation cases) do not fall under the scope of Article 6(1) of the Convention. However, Article 13[57] (the right to an effective remedy) will always apply, and this may require a remedy or procedural safeguards akin to those found in Article 6(1).[58]

GENERAL INSTITUTIONAL/PROCEDURAL REQUIREMENTS FOR THE APPLICABILITY OF ARTICLE 6(1)

1. Independent and Impartial Tribunal

Regarding the right to an *independent and impartial tribunal*, as guaranteed by Article 6(1) of the Convention, the Court noted that the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law.[59] What is at stake is the confidence which the courts in a democratic society must inspire in the public, as "justice must not only be done, it must also be seen to be done".[60]

The independence and impartiality of a tribunal is the central pillar of the right to a fair hearing. In the context of administrative proceedings, whenever civil rights and obligations are determined, these must be adjudicated, in at least one stage of the proceedings, by an impartial and independent administrative court or tribunal.[61]

In order to establish whether a court can be considered to be "independent" within the meaning of Article 6(1), regard must be had, *inter alia*, to the

56 *Ibid.,* para. 93.

57 Article 13 of the Convention reads: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

58 Mole & Harby, *op. cit.*, p. 14.

59 *Saghatelyan v. Armenia*, App. no. 7984/06, Judgment of 20 October 2015, para. 43; *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 70.

60 See *e.g. Oleksandr Volkov v. Ukraine*, App. no. 21722/11, Judgment of 9 January 2013, para. 106; *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 73; *Morice v. France*, App. no. 29369/10, Judgment of 23 April 2015, para. 78.

61 See *Beausoleil v. France*, App. no. 63979/11, Judgment of 6 October 2016, paras. 38–42.

manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[62]

Finally, the concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination and the Court can examine the issues of independence and impartiality together.[63]

With a view to guaranteeing the independence of the judiciary, it is appropriate to note that the Court has considered numerous cases with respect to *disciplinary proceedings* against judges. The Court emphasised the need for substantial representation of judges chosen by their peers on the relevant disciplinary body recognised by the Court in conformity with regional standards.[64] The Court referred to the growing importance that international and Council of Europe legal instruments, international case law and practice of international bodies attached to procedural fairness in cases involving the removal or dismissal of judges.[65] The Court has taken the view that a State cannot legitimately invoke the independence of the judiciary to justify a measure such as a dismissal for reasons that had not been established by law and did not relate to professional incompetence or misconduct. The inference in the premature termination of the mandate therefore did not pursue a legitimate aim and, thus, threatened the independence of the judiciary.[66]

Furthermore, the Court has noted in various cases that, pursuant to Article 19 of the Convention, it is not its task to take the place of the national domestic courts, and that its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. It is primarily for the national authorities, notably the courts, to assess the evidence and to resolve problems of interpretation of domestic legislation.[67] Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts.[68] For example, in *Ramos Nunes de Carvalho E Sá v. Portugal* cited above, the Court noted that it was not its

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62 *Brudnicka and Others v. Poland*, App. no. 54723/00, Judgment of 3 March 2005, para. 38.

63 *Sacilor-Lormines v. France*, App. no. 65411/01, Judgment of 9 November 2006, para. 62; *Oleksandr Volkov v. Ukraine*, paras. 103–107.

64 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 75.

65 *Baka v. Hungary,* para. 114.

66 *Ibid*., para. 156.

67 *Nejdet Şahin and Perihan Şahin v. Turkey*, App. no. 13279/05, Judgment of 20 October 2011, para. 49; *Saez Maeso v. Spain*, App. no. 77837/01, Judgment of 9 November 2004, para. 22; *Işyar v. Bulgaria*, App. no. 391/03, Judgment of 20 November 2008, para. 48.

68 *Nejdet Şahin and Perihan Şahin v. Turkey*, para. 50; *Ādamsons v. Latvia*, App. no. 3669/03, Judgment of 24 June 2008, para. 118; *Gregório de Andrade v. Portugal*, App. no. 41537/02, Judgment of 14 November 2006, para. 36.

task, in the context of Article 6(1), to ascertain *whether the decisions of the HCJ [High Council of Judiciary] imposing penalties on the applicant complied with the domestic legislation, but rather to verify whether the scope of the judicial review conducted by the Supreme Court of Justice was sufficient*.[69]

In particular, it is not the function of the Court to deal with errors of fact or law allegedly made by a national court in assessing the evidence before it, unless and in so far as they may have infringed rights and freedoms protected by the Convention. The Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action.[70] The jurisdiction of the Court is limited to reviewing compliance with the requirements of the Convention and its sole task in connection with Article 6(1) of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing.[71]

2. A Tribunal Established by the Law

Another requirement deriving from Article 6(1) of the Convention is that a tribunal be established by domestic law. It regards not only the institutional part of the establishment of the tribunal, but its composition in a particular case as well. A court or tribunal is characterised in the substantive sense of the expression by its judicial function, that is to say, to determine matters within its competence on the basis of rules of law, following proceedings conducted in a certain prescribed manner.[72]

However, in some cases, the Court held that a national authority not classified as one of the courts of a State may nonetheless, for the purposes of Article 6(1), come within the concept of a "tribunal" in the substantive sense of the expression,[73] thus implying "*an autonomous"* nature of the tribunal concept *per se*. Thus, the Court's case-law has contributed to a broader

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69 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 82.

70 *Centro Europa 7 S.r.l. and Di Stefano v. Italy,* App. no. 38433/09, Judgment of 7 June 2012, para. 197.

71 *Avotiņš v. Latvia*, App. no. 17502/07, Judgment of 23 May 2016, paras. 47–48; *Centro Europa 7 S.r.l. and Di Stefano v. Italy,* para. 197.

72 *Sramek v. Austria*, App. no. 8790/79, Judgment of 22 October 1984, para. 36. In this case, under Austrian law, the Regional Authority was not classified as a court. However, for the purposes of Article 6, the Court opined that the Regional Authority was also a tribunal "established by law", within the concept of a "tribunal" in the substantive sense of this expression.

73 *Ibid.* See also *Argyrou and Others v. Greece*, App. no. 10468/04, Judgment of 15 January 2009, para. 27.

concept of "a tribunal" or "court", going beyond the traditional formal judicial mechanisms and consequently enabling the application of Article 6(1) even in administrative disputes of a non-judicial nature.[74]

The Court considers that a "tribunal" must always be "established by law", as it would otherwise lack the legitimacy required in a democratic society to hear individual cases. The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also the tribunal's compliance with the particular rules that govern it and its composition.[75] Therefore, within the meaning of Article 6(1), the concept of "law" comprises not only the legal framework providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular.[76] This includes, in particular, provisions concerning the independence of the members of a "tribunal", the length of their term of office, impartiality and the existence of procedural safeguards, etc.[77]

3. Publicity of the Hearing and Its Exceptions

In the context of Article 6(1) of the Convention, *publicity of the hearing* is also an important standard. As a general rule, hearings should be public. However, this rule is subject to limitations. The press and public may only be excluded from all or part of court proceedings for reasons of morality, public order or national security in a democratic society.[78]Any exclusion of the press and the public or restrictions of their access to hearings should be reasoned by the court. Public access may also be limited where the interest of children or of the private lives of the parties so require, or to the extent strictly required in special circumstances where publicity would prejudice the interests of justice.[79] In cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of private persons and the sensitivity of the subject matter at hand requires otherwise (*i.e.* proceedings involving juveniles, matrimonial disputes or child custody or adoption issues).

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74 *Argyrou and Others v. Greece,* para. 27. See also *Rolf Gustafson v. Sweden*, App. no. 23196/94, Judgment of 1 July 1997, para. 48.

75 *Sokurenko and Strygun v. Ukraine*, App. nos. 29458/04 and 29465/04, Judgment of 20 July 2006, para. 24.

76 *DMD Group, A. S., v. Slovakia*, App. no. 19334/03, Judgment of 5 October 2010, para. 59.

77 *Gurov v. Moldova*, App. no. 36455/02, Judgment of 11 July 2006, para. 36. See also *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), op. cit*., p. 26.

78 *Handbook for Monitoring Administrative Justice,* pp. 42–43.

79 *Ibid.,* p. 43. See *e.g. B. and P. v. the United Kingdom,* App. nos. 36337/97 and 35974/9, Judgment of 24 April 2001, para. 39.

Therefore, Article 6(1) determines the following reasons for not allowing the publicity of a hearing:

- the protection of morals;
- the protection of national security;
- the protection of public order;
- the protection of the interests of juveniles;
- the protection of private life of the parties; and,
- under special circumstances where publicity would prejudice the interests of justice, upon a court decision.

4. Access to a Court

The right of (equal) access to administrative courts and tribunals must be applicable to all private persons, regardless of nationality or statelessness, or of status. The ECtHR has held that the litigants (parties in general) must have the opportunity to become familiar with the evidence before the court, as well as the opportunity to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time.

The right of access to evidence is one of the elements of access to a court. This access is, however, not unlimited. The right may be restricted on a number of legitimate grounds, such as protection of national security[80] or preservation of the fundamental human rights of another private person. However, limitations of access to relevant information must also be proportionate. The Court has applied a less exacting standard in situations involving the above legitimate grounds (*i.e.* national security considerations) for withholding documentary evidence. However, that standard of scrutiny should not be applied automatically; the Court retains the power to assess independently whether the case involved such legitimate considerations.[81]

In addition, the Court has made reference to several international and CoE instruments to highlight the growing international standard regarding the protection of the independence and irremovability of the judiciary, including, among others, *access to a court* in case of the dismissal of judges. As the Court highlighted in *Baka v. Hungary,* Contracting States to the Convention cannot circumvent their obligation to protect fundamental rights by adopting constitutional legislation, which is not subject to judicial review at the domestic level. By unlawfully individualising the application of the Fundamental Law

80 *Mirilashvili v. Russia,* App. no. 6293/04, Judgment of 11 December 2008, para. 196.
81 *Ibid.*

provisions and terminating the mandate of the applicant, the domestic authorities not only violated his right to a fair trial, but also trampled on the rule of law.

5. Reasonableness of the Length of Proceedings

The Court held that the *reasonableness of the length of proceedings* must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what was at stake for the applicant in the dispute.[82] The entire time period (*i.e.* from the initiation of the administrative procedure, throughout the proceedings before the court, until the judgment becomes final) should be taken into consideration when determining whether the *time* elapsed *is reasonable*. The Court would assess the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.[83] This period might also be extended to include proceedings related to the enforcement of decisions.[84] Moreover, the Court recalled that it was for the Contracting States to organise their legal systems in such a way that the competent authorities could meet the requirements of Article 6(1) of the Convention, including the obligation to hear cases within a reasonable time and that the overall length of proceedings meets the reasonable-time requirement.[85]

As noted above, the Court has established in its case-law the factors/criteria that should be taken into account when assessing whether a length of time can be considered reasonable. The Court has regard to the particular circumstances of the case,[86] but it has not established an absolute time-limit. In some cases, the Court makes an overall assessment rather than referring directly to the above-mentioned criteria. The Court has recalled

82 See *e.g. Gjonbocari and Others v. Albania*, App. no. 10508/02, Judgment of 23 October 2007; *Stanka Mirković and Others v. Montenegro*, App. nos. 33781/15 and 3 others, Judgment of 7 March 2017. See also Vitkauskas & Dikov, pp. 73–75; Mole & Harby, pp. 24–28.

83 *Vilho Eskelinen and Others v. Finland,* para. 67.

84 See *Scordino v. Italy,* App. no. 43662/98, Judgment of 29 March 2006; *Jankovic v. Croatia*, App. no. 38478/05, Judgment of 5 March 2009.

85 *Petrovic v. the former Yugoslav Republic of Macedonia*, App. no. 30721/15, Judgment of 22 June 2017, paras. 25–26; *Mishgjoni v. Albania,* App. no. 18381/05, Judgment of 7 December 2010, paras. 56–60; *Makarova v. Russia*, App. no. 23554/03, Judgment of 1 October 2009, paras. 38–43.

86 See *e.g. Parizov v. the former Yugoslav Republic of Macedonia*, App. no. 14258/03, Judgment of 7 February 2008; *Surmeli v. Germany*, App. no. 75529/01, Judgment of 8 June 2006.

that, according to its established case-law, the reasonable time in civil matters may begin to run, in some circumstances, even before the dispute is submitted for adjudication by a court, namely where a court cannot be seized without prior recourse to a remedy before a non-judicial organ.[87]

All aspects of a case are relevant in assessing whether it is complex. Complexity may concern questions of fact as well as legal issues. The Court has attached importance to *e.g.* the nature of the facts to be established, international elements, the joinder of the case to other cases, the intervention of other persons in the procedure, etc. The Court has held that certain matters call for special expediency, for example pension disputes, litigation regarding custody of children,[88] labour disputes after the dismissal of the applicants, cases regarding compensation for the victims of road accidents, etc.

6. Equality of Arms

As regards the *equality of arms*, the Court has held that the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.[89] What is at stake is the applicant's confidence in the workings of justice, which is based, *inter alia*, on the knowledge that she/he has had the opportunity to express their views on each document in the file.[90]

Article 6(1) of the Convention cannot be construed as providing for a specific form of service of court mail;[91] nor are the domestic authorities required to provide a perfectly functioning postal system.[92] However, in *Zagorodnikov v. Russia*, the domestic law required of the domestic courts to verify at the beginning of the proceedings whether the notice to appear had been duly dispatched to the absentee parties. When this has not been done, the Court concludes that a domestic court had failed to comply with its obligation to secure the applicant's presence at the hearing.[93]

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87 *Petrovic v. the former Yugoslav Republic of Macedonia*, para. 21.

88 *Niederboster v. Germany*, App. no. 39547/98, Judgment of 27 February 2003, para. 39.

89 *Avotiņš v. Latvia*, para. 48. See also *Handbook for Monitoring Administrative Justice,* p. 65–66; Vitkauskas & Dikov pp. 48–49.

90 *Ibid.*

91 *E.g.* in *Bats v. Ukraine*, App. no. 59927/08, Judgment of 24 January 2017, the Court noted in particular, that the examination of the applicant's case on appeal in his absence was compatible with the principle of equality of arms within the meaning of Article 6(1) of the Convention, regard being had to his allegations that he had not been served a summons notifying him of the time of the appeal hearing.

92 *Zagorodnikov v. Russia*, App. no. 66941/01, Judgment of 7 June 2007, para. 31.

93 *Ibid.*

Therefore, the general concept of a fair trial, encompassing the fundamental principle that proceedings should be *"adversarial"*, requires that the person against whom proceedings have been initiated is informed of this fact.[94]

The Court has held that where domestic law provides for discretion in choosing the means of notification, it may still be incumbent on the domestic courts to ascertain that their summonses of other documents have reached the parties sufficiently in advance and, where appropriate, record their findings in the text of the judgment.[95]

7. Execution of Final Decisions

The *right to execution of final decisions*, given by any court, including an administrative court, is an integral part of the right to a fair trial.[96] Fair trial rights would be illusory if the final judgment of any court or tribunal were allowed not to be executed. This is of even greater importance in the context of administrative proceedings. By lodging an application for judicial review with the State's highest administrative court, the litigant seeks not only the annulment of the impugned decision but also and above all the removal of its effects. The effective protection of the litigant and the restoration of legality therefore impose an obligation on the administrative authorities to comply with the judgment. Thus, while some delay in the execution of a judgment may be justified in particular circumstances, the delay may not be such as to impair the litigant's right to the enforcement of the judgment.[97]

The obligation to enforce final judgments lies with the state, and is equally valid regardless of whether courts or other entities are responsible for execution. Inaction by the enforcement authorities or excessive delays in implementing court decisions are violations of the right to a fair trial and the right to an effective remedy.[98] Understood in this way, enforcement must be full and exhaustive and not just partial, and may not be prevented,

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94 *Dilipak and Karakaya v. Turkey*, App. nos. 7942/05 and 24838/05, Judgment of 4 March 2014, paras. 76–77. In another case, *Regner v. the Czech Republic,* App. no. 35289/11, Judgment of 26 November 2015, the Court noted that the decision-making process had complied as far as possible with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the applicant's interests, wherefore it found no violation of Article 6(1) of the Convention.

95 See *e.g. Gankin and Others v. Russia*, App. nos. 2430/06, Judgment of 31 May 2016, para. 36.

96 See *e.g. Plazonić v. Croatia*, App. no. 26455/04, Judgment of 6 March 2008; *Burdov v. Russia (No. 2)*, App. no. 33509/04, Judgment of 15 January 2009; *Olaru and Others v. Moldova,* App. nos. 476/07, 22539/05, and 17911/08, Judgment of 28 July 2009.

97 *Burdov v. Russia (No. 2)*, para. 81; *Qufaj Co. SH.P.K. v. Albania,* App. no. 54268/00, Judgment of 18 November 2004, para. 38.

98 See *e.g. Krndija and Others v. Serbia*, App. nos. 30723/09, 9370/13, 32658/12, and 2632/09; Judgment of 27 June 2017; *Gjyli v. Albania,* App. no. 32907/07, Judgment of 29 September 2009.

invalidated or unduly delayed;[99] furthermore, judgments should be enforced within a reasonable period of time.[100]

An unreasonably long delay in enforcement of a binding judgment may breach the Convention. The reasonableness of such delay is to be determined by different factors, having regard in particular to the complexity of the enforcement proceedings, the applicant's own behaviour and that of the competent authorities, and the amount and the nature of the court award.[101]

8. Effective Remedy

Article 13 of the Convention guarantees the availability at a national level of an *effective remedy* to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order, bearing in mind that the remedy must be "*effective"* in practice as well as in law,[102] in the sense that it either prevents the alleged violation or its continuation, or provides adequate redress for any violation that has occurred.[103] The burden of proof lies on the State to demonstrate that the specific remedy is effective. In *M. S. S. v. Belgium and Greece,* the Court held:

> "The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so [...].
>
> In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State [...]
>
> Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance

99 See *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb),* p. 23. See *e.g. Matheus v. France,* App. no. 62740/00, Judgment of 31 March 2005; *Sabin Popescu v. Romania,* App. no. 48102/99, Judgment of 2 March 2004.

100 *Handbook for Monitoring Administrative Justice,* p. 77.

101 *Raylyan v. Russia*, App. no. 22000/03, Judgment of 15 February 2007, para. 31.

102 *Kudła v. Poland,* App. no. 30210/96, Judgment of 26 October 2000*,* para. 157; *İlhan v. Turkey,* App. no. 22277/93, Judgment of 27 June 2000, para. 97.

103 See *Gjonbocari and Others v. Albania*, para. 75; *Marini v. Albania*, App. no. 3738/02, Judgment of 18 December 2007, paras. 153–154; *Kudła v. Poland,* paras. 158–159.

> of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision [...]."[104]

The right to an effective remedy also requires the cessation of the violation and implementation of provisional or interim measures to avoid continuing violations and the provision of adequate compensation.[105] As noted in a number of cases *versus* Albania,[106] the Court ruled that there had been a breach of Articles 6(1) and 13 of the Convention (sometimes in conjunction with Article 1 of Protocol No. 1 to the Convention as well) on account of the non-enforcement of final domestic decisions awarding compensation. The Court has often emphasised in its judgments in cases against Albania (some of which have already been mentioned in this Chapter) that the domestic authorities' failure over so many years to enforce the final domestic decisions and, notably, to pay the compensation awarded, breached the applicants' rights under Article 6(1) and under Article 1 of Protocol No. 1 to the Convention.

The Court also ruled that the absence of an effective domestic remedy that allowed for adequate and sufficient redress on account of the prolonged non-enforcement of the final domestic decisions awarding compensation would also result in a violation of Article 13 of the Convention[107]. Remedies cannot be considered effective when they prove illusory because of the general conditions prevailing in the country, when they are excessively onerous for the affected individual, or when the state does not ensure their proper enforcement by the judicial authorities.[108]

"PRESUMPTION OF EQUIVALENT PROTECTION" STANDARD

And lastly, some remarks on the ECtHR's role in establishing the standard of "*presumption of equivalent protection*", especially when a specific case also regards EU or international standards.

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104 *M. S. S. v. Belgium and Greece,* App. no. 30696/09, Judgment of 21 January 2011, paras. 289–291.

105 See *e.g. Sharra and Others v. Albania*, App. nos. 25038/08, 64376/09, 64399/09, 347/10, 1376/10, 4036/10, 12889/10, 20240/10, 29442/10, 29617/10, 33154/11 and 2032/1, Judgment of 10 November 2015; *Vrioni and Others v. Albania,* App. nos. 35720/04 and 42832/06, Judgment of 7 December 2010; *Scordino v. Italy.*

106 See *e.g. Manushaqe Puto and Others v. Albania,* App. nos. 604/07, 43628/07, 46684/07 and 34770/09, Judgment of 31 July 2012; *Vrioni and Others v. Albania*; *Gjyli v. Albania*; *Themeli v. Albania,* App. no. 63756/09, Judgment of 15 January 2013; *Ramadhi and Others v. Albania*, App. no. 38222/02, Judgment of 13 November 2007; *Sharra and Others v. Albania*, etc.

107 Mole & Harby, p. 11.

108 *Handbook for Monitoring Administrative Justice,* p. 44.

As mentioned, when ruling on a case, the Court is limited to reviewing compliance with the requirements of the Convention provisions. Consequently, in the absence of any arbitrariness which would in itself raise an issue under the Convention (specifically Article 6(1), for the purpose of this Chapter, alone or in conjunction with the other relevant provisions of the Convention), it is not for the Court to make a judgment as to whether the national competent authorities correctly applied the international standards or any provisions of EU law.[109] In that connection, the Court has emphasised that, under Article 19 of the Convention, it has jurisdiction only to ensure observance of the rights and freedoms guaranteed by the Convention itself and its Protocols. Therefore, it does not have jurisdiction to rule formally on compliance with domestic law, other international treaties or EU law. The jurisdiction of the Court is confined to verifying whether the requirements of Article 6(1) of the Convention have been satisfied in the circumstances of the case. As previously mentioned, the Court noted that the protection of fundamental rights afforded by the European Union was in principle equivalent to that provided by the Convention.[110] In another landmark case, *Michaud v. France*,[111]the Court held that the States remained responsible under the Convention for the measures they took to comply with their international legal obligations, even when those obligations stemmed from their membership of an international organisation to which they had transferred part of their sovereignty. It is true, however, that the Court has also held that an action taken in compliance with such obligations is justified as long as the relevant organisation is considered to protect fundamental rights, both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least "equivalent" and "comparable" to that provided for by the Convention.

However, a State remains fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion.[112] In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "*constitutional instrument of European public order"* in the field of human rights.[113] This standard was well established by the Court in its noteworthy judgment in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*:

> "The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international

109 *Avotiņš v. Latvia*, para. 47.

110 *Ibid.*

111 *Michaud v. France,* App. no. 12323/11, Judgment of 6 December 2012, para. 102; See also *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland,* App. no. 45036/98, Judgment of 30 June 2005, para. 154.

112 *M. S. S. v. Belgium and Greece,* para. 338.

113 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland,* para. 156.

(including a supranational) organisation in order to pursue cooperation in certain fields of activity [...]. Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party[...].

On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention [...].

[...]

In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights [...].

It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. [...]"[114]

II SELECTED CASES: COMMENTS AND CASE BRIEFS

The case of *Vilho Eskelinen and Others v. Finland* is a very interesting and important one as it established a new practice within the case-law developed by the ECtHR at the time. The Court's approach to determining whether civil servants could bring their employment disputes within Article 6(1) of the Convention has undergone essential changes after its judgment in *Vilho Eskelinen and Others v. Finland* delivered in 2007. Before this judgment, the Court's case-law had followed the functional categorisation of when particular civil servants fell outside the protection of Article 6(1) of the Convention established in *Pellegrin v. France.* As certain public positions are closely linked to a State's sovereign interests, access to administrative and judicial review may be legitimately restricted. The Court's new approach is reflected in its general consideration, expressed in *Vilho Eskelinen,* that the *functional criterion adopted in the case of Pellegrin v. France must be further developed*[115] in favour of judicial control. While the *Pellegrin* judgment was the first step towards the partial applicability of Article 6(1) rather than its inapplicability, the cases that followed allowed claims not only for salary but also for allowances, dismissals and recruitment on similar grounds as other employees with no special bond to the State. The case of *Vilho Eskelinen* introduced a new two-stage test and two conditions that have to be fulfilled for Article 6(1) to remain inapplicable to civil servants. *Firstly*, the State in its domestic law must expressly exclude access to a court for the post or category of servants in question. *Secondly*, the exclusion must be justified on objective grounds in the State's interest. Despite the dissenting opinion of five judges in this case, the new functional criterion established in this case commendably renders it more difficult for the Governments to contend that civil/public servants fall outside the scope of the civil rights and obligations limb of Article 6(1) of the Convention. Since *Vilho Eskelinen*, the Court has continued refining the two abovementioned conditions with emphasis on granting the broadest possible judicial review and applicability of Article 6(1) of the Convention.

114 *Ibid.,* paras. 152–157.

115 *Vilho Eskelinen and Others v. Finland*, para. 56. The Court argued why there was a need for further development of its case-law, in paras. 60–64.

The case of *Stanka Mirković and Others v. Montenegro* concerned the violation of Article 6(1) of the Convention in conjunction with Article 13 due to the lack of an effective remedy. Relying on Article 6(1) of the Convention, the applicants complained about the overall length of the administrative proceedings due to repeated remittals of the case. The Court highlighted that the repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a State's judicial system.[116] Prior to adjournment, over the course of ten years, six months and eleven days, the domestic bodies issued twenty-one decisions (including two decisions of the Constitutional Court) and remitted the case nine times, and once again the case was pending before the first-instance administrative body. The Court noted that neither the complexity of the case nor the applicants' conduct explained the length of the proceedings. In view of the above, the Court ruled that there had been a violation of Article 6(1) of the Convention, in conjunction with Article 13, on account of the lack of an effective remedy under domestic law for the applicants' complaints concerning the length of the proceedings.

The importance of the principle of independence and impartiality of the judiciary is illustrated in *Ramos Nunes de Carvalho E Sá v. Portugal*. This case regards the Supreme Court of Justice's inadequate review of the High Council of the Judiciary (HCJ) disciplinary decisions in respect of a judge in the light of the fair trial requirements. The case concerned administrative disciplinary proceedings brought against a judge ending with the HCJ imposing disciplinary penalties, and a review carried out by the Supreme Court of Justice as an appeal body. The Court noted that during the HCJ deliberations, the judicial members of the HCJ formation examining Ms Ramos Nunes de Carvalho E Sá's case had been in the minority, and found this situation to be problematic from the standpoint of Article 6(1) of the Convention. The Court also held that the Supreme Court of Justice's review of the HCJ's disciplinary decisions had been insufficient, as the Supreme Court had failed to review the facts disputed by the applicant although they constituted substantial arguments relevant to the outcome of the proceedings. The Court concluded that the domestic authorities had failed to secure the guarantees of a public hearing in the present case, thus hindering the judge's ability to defend her case and call a witness, and had failed to ensure the safeguards of a fair hearing. In the context of disciplinary proceedings against the judge conducted by the HCJ, the ECtHR questioned the level of influence of the legislative or executive authorities given that the majority of the Council members had been appointed directly by these authorities. For this reason, in Member States where a Council for the Judiciary has

116 See also *Pavlyulynets v. Ukraine*, App. no. 70767/01, Judgment of 6 September 2005.

been established, its independence is particularly important for avoiding undue influence from the Government or the Parliament to guarantee the independence of judges. For the same reason, well established European standards, in particular *Recommendation CM/Rec(2010)12* of the Committee of Ministers to Member States o*n judges: independence, efficiency and responsibilities,* stipulate that "[N]ot less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."[117] It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such an authority has been established, its independence must be guaranteed in line with European standards and the ECtHR's well-established case-law.

CASE OF VILHO ESKELINEN AND OTHERS V. FINLAND
(Final Judgment of 19 April 2007)

CASE BRIEF

I FACTS

The eight applicants were Finnish citizens and all worked in the Sonkajärvi Police District. Under a collective agreement concluded in 1986, they were entitled to a remote-area allowance, which was added to their salaries as a bonus for working in a remote part of the country and calculated on the basis of a given area's remoteness. When that allowance was withdrawn in March 1988, they were given individual wage supplements to make up the difference of the salary payable to civil servants.

On 1 November 1990, after being moved to another duty police station as the Sonkajärvi Police District was incorporated into another district even further away from their homes, the applicants lost their individual wage supplements and the length of their commute allegedly increased by up to 50 km/day. They maintained, however, that the Kuopio Provincial Police Command had promised them compensation.

On 3 July 1991, the Ministry of Finance refused a request from the Police Department of the Ministry of Interior for authorisation to pay each applicant a monthly individual wage supplement of 500-700 Finnish marks (EUR 84-118). The Ministry of Finance gave no reasons for its refusal. The applicants subsequently lodged an application for compensation to the County

117 *Ramos Nunes de Carvalho E Sá v. Portugal,* para. 48.

Administrative Board. Four years later, on 19 March 1997, the request was rejected by the County Administrative Board.

In April 1997, the applicants appealed to the County Administrative Court, asking for an oral hearing to prove, among other things, that they had been promised compensation. Their appeal was rejected on the ground that, at the relevant time, only the Ministry of Finance (not the provincial police command) could authorise compensation. This court also found that no compensation had been awarded in other similar cases. Having received the public authorities' replies to the appeal, the Kuopio County Administrative Court said in its decision of June 1998 that rectification of wage increases affecting pensions fell outside its jurisdiction, wherefore it was unnecessary to receive oral testimony from the parties concerning the incorporation of police districts, or on how the case has been otherwise handled, in order to clarify the case.

The applicants appealed further with the Supreme Administrative Court requesting an oral hearing and emphasising that similar wage supplements had been granted to other police personnel from other police districts in similar situations.[118] On 27 April 2000, the Supreme Administrative Court decided to uphold the lower court's decision. It ruled that the applicants had no statutory right to the individual wage supplements and that it was unnecessary to hold a hearing, given that the alleged promises made by the provincial police command had no bearing on the case.

II LEGAL ISSUES

(1) Whether the applicants' complaints about the excessive length of the proceedings concerning the terms of their employment as civil servants and about the lack of an oral hearing before any of the domestic instances should be considered in breach of Article 6(1) of the Convention.

(2) Whether the applicants' complaints concerning the lengthy proceedings that could render their appeals ineffective constituted a violation of Article 13 of the Convention in conjunction with Article 6(1).

(3) Whether the applicants' allegation that they had been treated differently from other civil servants working in certain municipalities, because the remote-area allowance they had received had been

118 Under Section 38(1) of the Administrative Judicial Procedure Act – Law No. 586/1996 – an oral hearing must be held if requested by a private party. An oral hearing may, however, be dispensed with if a party's request is ruled inadmissible or immediately dismissed or if an oral hearing would be clearly unnecessary due to the nature of the case or other circumstances.

removed from the group for which this allowance was to be paid, was in breach of Article 1 of Protocol No. 1 to the Convention in conjunction with Article 14 Convention.

III HOLDING

(1) Article 6(1)of the Convention is applicable in the present case (by twelve votes to five);

(2) There has been a violation of Article 6(1)of the Convention as regards the length of the proceedings (by fourteen votes to three);

(3) There has been no violation of Article 6(1)of the Convention as regards the lack of an oral hearing (unanimously);

(4) There has been a violation of Article 13 of the Convention (by fifteen votes to two);

(5) There has been no violation of Article 1 of Protocol No. 1 (protection of property) taken alone or in conjunction with Article 14 (prohibition of discrimination) (unanimously);

(6) The respondent State is to pay, within three months, EUR 2,500 Euros to each applicant in respect of non-pecuniary damage, and EUR 9,622.11 to the applicants jointly in respect of costs and expenses, and any tax that may be chargeable on the above amounts (by thirteen votes to four);

(7) The remainder of the applicants' claim for just satisfaction is dismissed (unanimously).

IV REASONING

(a) Reasons why the Court found the application admissible under Article 6

– Whether there was "a right" and whether it was "civil" in nature –

For Article 6 to apply, there must be a "right" and it must be "civil" in character. In this case, the Government disputed the applicability of Article 6 on two grounds, namely as to whether there was a "right" and as to whether it was "civil" in nature.

According to the principles enunciated in the ECtHR's case-law, the dispute over a "right", which can be said, at least on arguable grounds, to be recognised under domestic law, must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the

manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.

The Court noted that it had not been disputed that the Provincial Police Command had promised the applicants compensation. Nor did the national courts dismiss the applicants' claims as lacking any basis. While it is true that their claims had been rejected, the administrative courts may be regarded as having examined the merits of the application and in so doing they determined the dispute over their rights. The Court considered that, against such a background, the applicants could claim to have a right on arguable grounds.

Secondly, the Court examined the Government's argument, relying on *Pellegrin*, that Article 6 was not applicable since disputes raised by servants of the State, such as police officers, over their conditions of service were excluded from its ambit.[119]

The present case concerned proceedings on whether the applicants, who were civil servants, were entitled to receive a wage supplement. Before the judgment in *Pellegrin*, the Court had held that disputes relating to the recruitment, careers and termination of service of civil servants were as a general rule outside the scope of Article 6(1). That general principle of exclusion had, however, been limited and clarified in a number of its judgments. In its other judgments, it found that Article 6(1) was applicable where the claim in issue related to a "purely economic" right – such as payment of salary or an "essentially economic" one and did not mainly call in question "the authorities' discretionary powers". The Court concluded that the functional criterion, as applied in practice, had not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant was a party or brought about a greater degree of certainty in this area as intended.[120] The reasoning in this case was therefore limited to the situation of civil servants.

It was against this background and for these reasons that the Court found that the functional criterion adopted in *Pellegrin "must be further developed"*. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a

119 By expanding the *Pellegrin* criteria, the Court adopted a more evolutive approach to the ambit of Article 6 of the Convention regarding the civil nature of the rights disputed (by including here certain civil servants, categories and administrative disputes). It followed its usual procedure and first summarised its case-law on this issue and then proceeded to rule on whether there was a need to develop its case-law.

120 *Vilho Eskelinen and Others v. Finland*, para. 55. The Court referred *mutatis mutandis* to *Perez v. France*, App. no. 47287/99, Judgment of 12 February 2004, para. 55.

dynamic and evolutionary approach would risk rendering it a bar to reform or improvement.[121] The domestic system, in such circumstances, perceives no conflict between the vital interests of the State and the right of the individual to protection. Indeed, while neither the Convention nor its Protocols guarantee a right of recruitment to the civil service, it does not follow that, in other respects, civil servants fall outside the scope of the Convention.

(b) Reasons why the Court found a violation of Article 6 of the Convention regarding the length of proceedings

The period to be taken into consideration for determining whether the reasonable time requirement had been complied with started to run on the day the applicants lodged their application with the County Administrative Board, on 19 March 1993, because they could not seize the County Administrative Court before receiving a decision on their rectification request that could be appealed. The proceedings ended with the Supreme Administrative Court's decision of 27 April 2000. Thus, they lasted over seven years.

The Court assessed the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and with regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. Having had regard to the particular circumstances of the case, the Court concluded that there had been delays in the proceedings before the County Administrative Board, for which it had found no sufficient explanation. It therefore found a violation of Article 6(1) of the Convention on account of the length of the proceedings.

(c) Reasons why the Court found no violation of Article 6 of the Convention regarding the lack of an oral hearing

The applicants' purpose in requesting a hearing had been to demonstrate that the police administration had promised them that their economic loss would be compensated. The administrative courts had found in the circumstances that an oral hearing was manifestly unnecessary as the alleged promise lacked relevance. The Court found force in the Government's argument that any issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions.

The Court further observed that the applicants had not been denied the possibility of requesting an oral hearing, although it was for the courts to

121 *Vilho Eskelinen and Others v. Finland*, para. 56. The Court referred *mutatis mutandis* to *Mamatkulov and Askarov v. Turkey*, App. nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para. 121.

decide whether a hearing was necessary. The administrative courts had given consideration to the request and provided reasons for not granting it. Since the applicants had been given ample opportunity to put forward their case in writing and to comment on the submissions of the other party, the Court found that the requirements of fairness had been complied with and had not necessitated an oral hearing.[122] It concluded that there had, accordingly, been no violation of Article 6(1) of the Convention on account of the lack of an oral hearing.

(d) Reasons why the Court found a violation of Article 13 of the Convention[123]

The applicants maintained that the lengthy proceedings had rendered their appeals ineffective. The avenue of appeal had thus not been an effective one. The Court interpreted the applicants' complaint under Article 13 to mean that they claimed that they had no way of speeding up the domestic proceedings. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability, at the national level, of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" both in law and in practice.

The Court found that there was no specific legal avenue whereby the applicants could complain of the length of the proceedings with a view to expediting the determination of their dispute. The Court concluded that there had been a violation of Article 13 of the Convention in that the applicants had no domestic remedy whereby they could enforce their right to a hearing within a reasonable time as guaranteed by Article 6(1) of the Convention.

(e) Reasons why the Court did not find a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention[124]

The applicants complained under Article 1 of Protocol No. 1, either taken alone or in conjunction with Article 14, that the national authorities and courts had wrongfully applied the national law when refusing their claim.

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122 *Vilho Eskelinen and Others v. Finland*, paras. 72–74.

123 *Ibid.,* paras. 79–83.

124 *Ibid.,* paras. 93–96.

The Court recalled that for a claim to be regarded as an "asset" attracting the protection of Article 1 of Protocol No. 1 to the Convention, it had to have a sufficient basis in national law, for example, where there was settled case-law of the domestic courts confirming it. In the case under review, it followed from the implementing instruction that the applicants did not have a legitimate expectation of receiving an individual wage supplement since, as a consequence of the change in duty station, the entitlement to the wage supplement had ceased. Nor was there under the domestic law any right to be compensated for commuting costs.

As regards Article 14 of the Convention, there could be no room for its application unless the facts at issue fell within the ambit of one or more of them. In the circumstances, the Court found that there had been no violation of Article 1 of Protocol No. 1 to the Convention either taken alone or in conjunction with Article 14.

(f) Decision on just satisfaction

Under Article 41 (just satisfaction) of the Convention, and by 13 votes to 4, the Court awarded each of the applicants EUR 2,500 in respect of non-pecuniary damage and EUR 9,622.11, jointly, for costs and expenses.

CASE OF STANKA MIRKOVIĆ AND OTHERS V. MONTENEGRO
(Judgment of 7 March 2017)

CASE BRIEF

I FACTS

The case originated in four applications (nos. 33781/15, 33785/15, 34369/15 and 34371/15) against Montenegro filed by two Montenegrin nationals, Ms. Stanka Mirković and Mr. Oliver Mirković, and two Serbian nationals, Ms. Darinka Marjanović and Mr. Igor Mirković, on 30 June 2015. The applicants complained about the overall length of administrative proceedings, which had been delayed by repeated remittals of the case, and the lack of an effective remedy in that regard.

On 3 December 2004, the third and fourth applicants filed a request with the Restitution and Compensation Commission ("the Commission"), seeking compensation for land expropriated from their legal predecessor in 1946. Between 17 July and 12 August 2005, the first and second applicants

made statements waiving their rights in respect of the property belonging to the same legal predecessor in favour of the third and fourth applicants. On 28 August 2005, the Commission ruled in favour of the third and fourth applicants.

On 14 October 2005, the Ministry of Finance quashed that decision on an appeal filed on 19 September 2005 by the Supreme State Prosecutor in his capacity of legal representative of the State. On 17 April 2006, the Commission issued a new decision, awarding compensation to all the applicants as they were all heirs of the legal predecessor. In so doing, it also examined the waiver statements of the first and second applicants made in 2005, but considered that, pursuant to section 40 of the Restitution of Expropriated Property Rights and Compensation Act, such waiver statements could only be validly made in non-contentious proceedings before a competent court.

Between 12 June 2006 and 27 March 2014, the competent second-instance administrative body (first the Ministry of Finance and later the Appeals Commission) and the Administrative Court, before which the case was first brought in 2006, issued sixteen decisions in total (eight decisions each). The second-instance body ruled on a series of appeals and gave decisions within 55 days, 65 days, 30 days, 53 days, 14 days, 78 days, 94 days, and 132 days. The Administrative Court gave rulings within 1 year 8 months and 17 days, 7 months and 22 days, 7 months and 27 days, 3 months and 23 days, 5 months, 5 months and 19 days, 4 months and 16 days, and 4 months and 23 days.

On at least four occasions, when initiating an administrative dispute before the Administrative Court, the applicants explicitly referred to section 37 and/or section 58 of the Administrative Disputes Act and urged the Administrative Court to decide on the merits of their request. The Administrative Court never ruled on the merits of the initial compensation request, but instead quashed or upheld the quashing of the Commission's first-instance decision. Its last decision was issued on 27 March 2014, in substance remitting the case once again to the Commission.

On 27 June 2014, the Supreme Court upheld the Administrative Court's decision. The Supreme Court's decision was served on the applicants on 8 July 2014. On 25 July 2014, the applicants each lodged a constitutional appeal against the decision of the Supreme Court, relying, *inter alia*, on Articles 6 and 13 of the Convention. In addition to those constitutional appeals against the Supreme Court's decision, each of the applicants also lodged a second constitutional appeal against the decision of the Administrative Court of 27 March 2014. No copies of those second constitutional appeals were provided by either party.

On 28 October 2014, the Constitutional Court rejected the applicants' constitutional appeals against the Supreme Court's decision as premature, given that the Commission was still considering their compensation request. On 28 December 2015, the Constitutional Court issued another decision dismissing the applicants' constitutional appeals. The decision stated that the applicants' constitutional appeals had been filed against the judgments of the Administrative Court and the Supreme Court. In its ruling, the Constitutional Court constantly referred to the "impugned judgments". There is no information in the case file as to when that decision was served on the applicants.

On 31 March 2016, at a hearing before the Commission, the proceedings were adjourned at the applicants' request until the ECtHR ruled on their applications.

II LEGAL ISSUES

(1) Whether the domestic authorities could provide guarantees regarding the overall length of the administrative proceedings and therefore enable the applicants to successfully defend their case and whether they could ensure the safeguards of a fair hearing under Article 6(1) of the Convention.

(2) Whether the applicants' complaints concerning the length of the proceedings amounted to the lack of an effective domestic remedy, *i.e.* a violation of Article 13 of the Convention in conjunction with Article 6(1).

III HOLDING (UNANIMOUSLY)

(1) The applications are joined;

(2) The applications are admissible;

(3) There has been a violation of Article 6 (1) of the Convention;

(4) There has been a violation of Article 13 of the Convention;

(5) The respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 (2) of the Convention, EUR 1,560 to the first, second and third applicants jointly, and EUR 1,560 to the fourth applicant alone, plus any tax that may be chargeable, in respect of non-pecuniary damage; and EUR 625 to all the applicants jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(6) The remainder of the applicants' claim for just satisfaction is dismissed.

IV REASONING

(a) Reasons why the Court found the application admissible

Regarding the alleged violation of Article 6(1) of the Convention, the Court noted that this complaint was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention. It further noted that it was not inadmissible on any other grounds and therefore had to be declared admissible.

On account of admissibility, the Government submitted that the first and second applicants had no victim status, given that they waived their property rights in 2005. They further maintained that the applications had been submitted outside of the six-month time-limit. In particular, a constitutional appeal had not been an effective domestic remedy at the material time, and the last effective remedy had therefore been the Supreme Court's decision, which was served on the applicants on 8 July 2014, whereas the applications were lodged on 30 June 2015.

The Government also maintained that the applicants had failed to exhaust all available domestic remedies, in particular to request the inspection of the impugned proceedings and use the remedies provided for in cases concerning the "silence of administration", that is, when an administrative body fails to decide on an issue within the statutory time-limit; both of these remedies could have expedited the proceedings.

Lastly, the Government contested the applicants' additional complaint that the Constitutional Court had ruled twice on the same set of constitutional appeals. They maintained that the applicants had each submitted two constitutional appeals; one set of appeals had been rejected and the other set had been dismissed. In view of that, the Government maintained that the applications to the Court had been premature, given that the second set of constitutional appeals by the applicants had still been under consideration at the time of submission of the applications to the ECtHR.

The applicants contested the Government's submissions. In particular, they submitted that the first and second applicants' statements waiving their property rights had not been accepted in the impugned proceedings, and that they had been duly awarded compensation. As regards the exhaustion of domestic remedies, the applicants maintained that the proceedings before each body individually had not been excessive, but that the problem was the total length of the proceedings as a whole, the case being repeatedly remitted.[125]

125 *Stanka Mirković and Others v. Montenegro*, para. 38.

In their observations, the applicants also complained that the Constitutional Court had ruled twice on their constitutional appeals, the second time dismissing them on the merits.

1. The First and Second Applicants' Victim Status[126]

The Court noted that the first and second applicants' waiver statements had been duly examined in the administrative proceedings, and indeed not accepted on the grounds that a waiver statement could only be validly made before judicial bodies in the relevant proceedings. In view of that, the Commission, when ruling on the initial application, awarded compensation not only to the third and fourth applicants, but also the first and second applicants as early as 2006. The impugned proceedings, in which the applicants were all parties, were still ongoing.

In view of the above, the Court opined that the ongoing proceedings directly concerned the first and second applicants, who had a legitimate personal interest in seeing the proceedings brought to an end. Accordingly, and without prejudging the merits of the case, it concluded that they should be considered "victims" of the alleged violation within the meaning of Article 34 of the Convention and therefore dismissed the Government's objection.

2. Six-Month Time-Limit[127]

The Court noted that, following the Administrative Court and the Supreme Court upholding the decision that the case should be remitted, the case was once again before the Commission acting as a first-instance administrative body. The six-month time-limit could therefore not yet have started to run, and accordingly the Government's objection in this regard was dismissed.[128]

3. Non-Exhaustion of Domestic Remedies[129]

In another case *versus* Montenegro, the Court had observed that attempts to have lengthy administrative proceedings expedited by means of inspection

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126 *Ibid*., para. 40. As the Court noted, the relevant principles in this regard were set out in *Vallianatos and Others v. Greece*, App. nos. 29381/09 and 32684/09, Judgment of 7 November 2013, para. 47.

127 *Ibid*., paras. 43–44. As the Court noted, the relevant principles in this regard were set out in *Mocanu and Others v. Romania*, App. nos. 10865/09, 45886/07 and 32431/08, Judgment of 17 September 2014, paras. 258–261.

128 *Stanka Mirković and Others v. Montenegro*, para. 44.

129 *Ibid.,* paras. 45–49. As the Court noted, the relevant principles in this regard were set out in detail in *Vučković and Others v. Serbia*, App. nos. 17153/11 and 29 others, Judgment of 25 March 2014, paras. 69–75.

had failed, and dismissed the Government's objection as to the non-exhaustion of domestic remedies.[130] As the Government have provided no domestic case-law to the contrary in the instant case, the Court saw no reason to depart from its earlier finding. The Government's objection therefore had to be dismissed.

The Court noted that the General Administrative Proceedings Act and the Administrative Disputes Act provided for remedies in cases where a single administrative body failed to issue a decision within a certain time-limit. While the said remedies were generally effective,[131] the Court considered that they were not applicable to the applicants' case, since most of the bodies had ruled within the statutory time-limits. As for the few exceptions where this did had not happened, the Court considered that, even if the proceedings could have been slightly expedited on these occasions, that would not have prevented the repeated remittals of the case and the consequent overall delay, which was the issue in the present case. In view of that, the Court held that the Government's objection in this regard also had to be dismissed.[132]

As per the Government's objection that the applicants' complaint was premature, given that the second set of constitutional appeals was still pending at the time they lodged their applications, the Court reiterated that, while the requirement for an applicant to exhaust domestic remedies was normally determined with reference to the date on which an application was lodged with the Court, it also accepted that the last stage of such remedies may also be reached after the lodging of the application, but before the Court determined the issue of admissibility.[133] It thus concluded that this objection by the Government also had to be dismissed.

Lastly, the Court observed that the Government had been explicitly asked to provide their opinion on whether a request for review was an effective domestic remedy in respect of administrative proceedings not only before the Administrative Court, but also while they had been pending before various administrative bodies beforehand. The Government provided no comment whatsoever in this regard; nor did they refer to any relevant domestic case-law. In view of that, and similarly to the remedies provided for in the General

130 The Court referred to *Živaljević v. Montenegro*, App. no. 17229/04, Judgment of 8 March 2011, paras. 58–59.

131 The Court referred to *Vuković v. Montenegro*, App. no. 18626/11, Judgment of 27 November 2012, paras. 30–31, a case where the domestic authority (the Commission) had failed to rule on the applicant's request for more than seven years and six months.

132 *Stanka Mirković and Others v. Montenegro*, para. 48.

133 *Ibid*. The Court here made a reference to *Karoussiotis v. Portugal*, App. no. 23205/08, Judgment of 1 February 2011, para. 7.

Administrative Proceedings Act and the Administrative Disputes Act, the Court took the view that the request for review could have been of little use to the applicants given that the Administrative Court in principle ruled within the statutory time-limits. While a request for review could have perhaps slightly expedited only that particular part of the proceedings on those few occasions when the Administrative Court failed to rule within the said limits, in any event it could not have expedited the proceedings ongoing before various administrative bodies beforehand, nor could it have prevented the repeated remittals of the case and the consequent overall delay, which was the issue in the present case. As noted above, the Government offered no comment or case-law to the contrary.

In view of that, the Court could not but conclude that, whereas the said remedy could be used in order to expedite only the proceedings before the Administrative Court itself, that is, an administrative dispute,[134] it could not be used and hence be considered an effective domestic remedy in respect of the part of the proceedings that had been ongoing before various administrative bodies beforehand.

(b) Reasons why the Court found a violation of Article 6(1)of the Convention

Relying on Article 6(1) of the Convention, the applicants complained about the overall length of the administrative proceedings due to the repeated remittals of their case. The Government made no further comments in this regard. In particular, as the Court observed, the repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a State's judicial system.[135]

In the present case, the Court noted that the period to be taken into account began on 19 September 2005, the date on which an appeal of the first-instance administrative decision was lodged,[136] and was still ongoing. Given that the proceedings were adjourned at the applicants' request on 31 March 2016, the duration of the proceedings after that date could only be attributed to the applicants.

Prior to the adjournment, over the course of ten years, six months and eleven days, the domestic bodies issued twenty-one decisions (including

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134 *Stanka Mirković and Others v. Montenegro*, para. 49. The Court also referred to *Vukelić v. Montenegro*, App. no. 58258/09, Judgment of 4 June 2013, para. 85.

135 The Court made a reference to *Pavlyulynets v. Ukraine*, para. 51.

136 *Stanka Mirković and Others v. Montenegro*, para. 54. The Court referred *mutatis mutandis* to *Počuča v. Croatia*, App. no. 38550/02, Judgment of 29 June 2006, para. 30.

two decisions of the Constitutional Court) and remitted the case nine times, and once again the case was pending before the first-instance administrative body.

The Court considered that neither the complexity of the case nor the applicants' conduct explained the length of the proceedings. The Government did not supply any explanation for the delay or comment the matter whatsoever.

Consequently, in view of the above, the Court found a violation of Article 6(1) of the Convention.

(c) Reasons why the Court found a violation of Article 13 of the Convention

In its review of the admissibility of this claim, the Court noted that the applicants' complaint raised issues of fact and law under the Convention, the determination of which required an examination of the merits. The Court also held that the applicants' complaint was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention and could not be rejected on any other grounds. The complaint therefore had to be declared admissible.

The applicants reaffirmed their complaint about the lack of an effective remedy. The Court noted that the Government had asserted in their objections that there were remedies available in respect of the applicants' complaint under Article 6(1) regarding the length of the proceedings. These objections were rejected.

For the same reasons, the Court concluded that there had been a violation of Article 13 of the Convention, taken together with Article 6 (1), on account of the lack of an effective remedy under domestic law for the applicants' complaints concerning the length of the proceedings.[137]

(d) Court's views on other alleged violations of the Convention

On 4 July 2016, in their observations, the applicants complained for the first time about the Constitutional Court ruling twice on one set of constitutional appeals they had lodged. The Government contested this complaint, maintaining that the applicants had each submitted two constitutional

137 *Stanka Mirković and Others v. Montenegro*, para. 63. The Court also made reference to the cases of *Stevanović v. Serbia*, App. no. 26642/05, Judgment of 9 October 2007, paras. 67–68; *Stakić v. Montenegro*, App. no. 49320/07, Judgment of 2 October 2012, paras. 59–60.

appeals, hence there had been two decisions, one for each of the two sets of appeals. The Court observed that these complaints had not been included in the initial application, but were raised in the applicants' observations of July 2016. The Court therefore considered it inappropriate to take these matters up in the context of this application.[138]

(e) Decision on just satisfaction

The Court opined that it had not been duly substantiated that the applicants sustained pecuniary damage as a result of the violation of Article 6(1) and Article 13 of the Convention. However, the Court accepted that the applicants had suffered some non-pecuniary damage which could not be sufficiently compensated by the finding of a violation alone. Making its assessment on an equitable basis, the Court therefore awarded the first, second and third applicants EUR 1,560 jointly under this head, and the fourth applicant EUR 1,560.

According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejected the claim for costs and expenses in the domestic proceedings and considered it reasonable to award to all the applicants jointly the sum of EUR 625 in respect of the proceedings before the Court.

RAMOS NUNES DE CARVALHO E SÁ V. PORTUGAL
(Judgment of 21 June 2016)

CASE BRIEF

I FACTS

The applicant, *Paula Cristina Ramos Nunes de Carvalho e Sá*, is a Portuguese national and a judge in Portugal. In the present case, three sets of disciplinary proceedings were instituted against her at the time she was working as a judge at the Vila Nova de Famalicão Court of First Instance.

138 *Stanka Mirković and Others v. Montenegro*, para. 66. The Court made a reference to *Mugoša v. Montenegro*, App. no. 76522/12, Judgment of 21 June 2016, paras. 70–71; *Nuray Şen v. Turkey (No. 2)*, App. no. 25345/94, Judgment of 30 March 2004, para. 200; *Skubenko v. Ukraine*, App. no. 41152/98, Judgment of 6 April 2004; and *Melnik v. Ukraine*, App. no. 72286/01, Judgment of 28 March 2006, paras. 61–63.

In November 2010, the High Council of the Judiciary (HCJ) decided to institute an initial set of proceedings against her in the context of which a judicial inspector, judge F. M. J., proposed that she be ordered to pay 20 day-fines for having called another judicial inspector, judge H. G., a "liar" during a telephone conversation, whereby she had acted in breach of her duty of propriety. He also found that she had accused the inspector responsible for appraising her performance of "inertia and lack of diligence".

In March 2011, the applicant submitted a request to the HCJ for the inspector to be withdrawn from her case on the grounds that he had breached her right to be presumed innocent and had close ties to the judicial inspector, whom she had allegedly insulted. In a decision of 10 January 2012, the HCJ, sitting in a plenary composed of six judges and nine non-judges, ordered the applicant to pay 20 day-fines, corresponding to 20 days' salary, for acting in breach of her duty of propriety. The applicant appealed on points of law, requesting a review of the establishment of the facts.

On 21 March 2013, the Judicial Division of the Supreme Court of Justice unanimously upheld the HCJ's ruling, finding, *inter alia*, that its task was not to review the facts but only to examine whether the establishment of the facts had been reasonable.

A second set of disciplinary proceedings was opened against the applicant for using false testimony in the earlier proceedings. On 11 October 2011, the HCJ, sitting in plenary, ordered that the applicant be suspended from her duties for 100 days for acting in breach of her duty of honesty. It found that the applicant had given false testimony by asking a witness to make false statements concerning the allegations against her. She lodged an appeal disputing the facts with the Judicial Division of the Supreme Court of Justice. The Supreme Court of Justice upheld the HCJ's decision on 26 June 2013, finding, *inter alia*, that its powers were limited with regard to reviewing the facts.

A third set of disciplinary proceedings was brought against her for allegedly asking judicial inspector F. M. J., in the course of a private conversation, not to take disciplinary action against the witness, who had been called on her behalf during the first set of proceedings. In a decision of 10 April 2012, the HCJ, sitting in plenary, ordered that the applicant be suspended from her duties for 180 days for acting in breach of her duties of loyalty and propriety.

The Judicial Division of the Supreme Court of Justice unanimously upheld that decision. On 30 September 2014, the HCJ, sitting in plenary, after joining the penalties of the three sets of disciplinary proceedings, imposed on the applicant a single penalty of 240 days' suspension from her duties.

II LEGAL ISSUES

(1) Whether the domestic authorities could secure the guarantees of a public hearing, as well as provide the applicant with the ability to defend her case and call a witness, in order to ensure the safeguards of a fair hearing under Article 6(1) of the Convention.

(2) Whether the scope of review of the HJC's disciplinary decisions carried out by the Supreme Court of Justice had been sufficient for reviewing the facts disputed by the applicant although they were substantial arguments of relevance to the outcome of the proceedings, under Article 6(1) of the Convention.

III HOLDING

(1) The applications are joined (unanimously);

(2) The applications are admissible (unanimously);

(3) There has been a violation of Article 6(1) of the Convention (unanimously);

(4) It is not necessary to examine the complaints that the applicant had not been informed of the nature and cause of the accusation against her and that she had not had adequate time and facilities for the preparation of her defence (unanimously);

(5) The claim for just satisfaction is dismissed (by six votes to one).

IV REASONING

(a) Reasons why the Court found the application admissible

The Court noted that the complaints concerning the independence and impartiality of the judicial bodies, the scope of the review conducted by the Supreme Court of Justice and the lack of a public hearing were not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention. It further noted that these complaints were not inadmissible on any other grounds and therefore declared them admissible.

Relying on Article 6(1), the applicant alleged a breach of her right to an independent and impartial tribunal,[139] her right to obtain a review of the

139 The applicant submitted at the outset that the composition of the High Council of the Judiciary, chaired by the President of the Supreme Court of Justice, did not satisfy the requirements of an "independent tribunal". Under Article 218(1) of the Constitution, two of the members of the HCJ were appointed by the President of the Republic, seven were elected by the Assembly of the Republic and only eight of its seventeen members were judges, including the President of the Supreme Court of Justice and of the High Council of the Judiciary.

facts established by the HCJ and her right to a public hearing.[140] She further complained that, in view of the reclassification of the facts by the HCJ, she had not been informed in detail of the nature of the accusations against her and, accordingly, had not had adequate time and facilities for the preparation of her defence.

In the applicant's view, there were objective reasons to doubt the impartiality of the Judicial Division of the Supreme Court of Justice. The HCJ exercised disciplinary powers with regard to the judges of the Supreme Court of Justice, but not with regard to those of the Supreme Administrative Court. The fact that the HCJ appointed, appraised and exercised disciplinary powers in respect of the judges of the ordinary courts raised doubts regarding the impartiality of the judges of the Supreme Court of Justice when hearing disciplinary cases, in which they were called upon to set aside or uphold decisions taken by their own disciplinary body.

On account of admissibility, the Government argued:

With regard to the composition of the High Council of the Judiciary, the Government acknowledged that this body was made up of eight judges (including the President, who had a casting vote) and nine non-judicial members. However, they stressed that the intervention of the President of the HCJ was apt to compensate for the fact that judges were in a minority. As to the applicant's fears that the Judicial Division of the Supreme Court of Justice lacked impartiality, the composition of that Division was determined by law on the basis of judges' seniority and their membership of a particular Division, and not on the basis of the wishes of the President of the Supreme Court of Justice. Furthermore, the latter did not sit in cases in which the Judicial Division examined appeals against the decisions of the High Council of the Judiciary.

As to the scope of the Judicial Division's powers, the Government maintained that it was not for the Supreme Court of Justice to encroach on the discretionary powers of the administrative authorities. As that court had found in its judgment of 15 December 2011, it did not have jurisdiction to review the assessment made by the High Council of the Judiciary of a judge's conduct in the context of his or her duty to pursue the public interest. Furthermore, the Supreme Court of Justice had not re-examined the evidence, but simply verified that the evidence was sufficient to justify the conclusions reached

140 As to the requirement to hold a public hearing, the applicant noted that she had explicitly requested of the High Council of the Judiciary and the Supreme Court of Justice to organise a hearing, which, in her opinion, had been warranted in view of the non-technical nature of the issues raised, in Application no. 74041/13 (one of the three the judge had filed with the Court) in particular, and of the discrepancy in the establishment of the facts regarding the content of her alleged remarks.

by the High Council of the Judiciary, in other words, that the latter's decision concerning the establishment of the facts had been reasonable.

With regard to the holding of a public hearing (an issue raised in Application no. 74041/13), the Government acknowledged that it was not the practice of the Supreme Court of Justice to hold hearings. However, in the absence of any possibility of re-examining the evidence, holding a hearing made no useful contribution to the conduct of the proceedings. Moreover, in the instant case, the Supreme Court of Justice had found that the specific circumstances of the case did not require the holding of a public hearing.

(b) Reasons why the Court found a violation of Article 6 of the Convention

1. Independence and Impartiality of the Authorities Hearing the Case (Reviewing Authorities)

The Court held that the questions of independence and impartiality should be examined jointly in the present case.[141] It observed, first of all, that it had already found that where at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality. The Court noted that the notion of the separation of powers between the executive and the judiciary had assumed growing importance in its case-law.[142]

It also stated that, with regard to disciplinary proceedings against judges, the need for substantial representation of judges on the relevant disciplinary body had been recognised in the European Charter on the Statute for Judges and the opinions of the Venice Commission. It also pointed out that in its Recommendation CM/Rec(2010)12, the CoE Committee of Ministers recommended that the authority taking decisions on the selection and career of judges be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers. It further noted that in recommendation no. 6 of its Evaluation Report on Portugal adopted on 4 December 2015, the Group of States against Corruption (GRECO) recommended that Portugal provide in law that not less than half of the members of the HCJ should be judges chosen by their peers. It indicated, lastly, that the Consultative Council of European Judges had adopted, at

141 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 74.

142 *Ibid.,* para. 70. The Court also referred to *Stafford v. the United Kingdom,* App. no. 46295/99, Judgment of 28 May 2002, para. 78; and *Saghatelyan v. Armenia*, para. 43.

its 11th plenary meeting, a *Magna Carta* of Judges, providing, among other things, that the Council should be composed either exclusively of judges, or at least a substantial majority of judges elected by their peers.[143]

The Court therefore decided to examine the applicant's complaints concerning the independence and impartiality of the HCJ in the light of the above-mentioned principles. It noted that the HCJ was composed of 17 members, two of whom were appointed by the President of the Republic, seven by the Assembly, and seven others by the judges from among their peers. In its normal composition, the HCJ was thus composed of eight judges, including the President who had a casting vote, and nine non-judicial members. The Court observed that the Council could therefore be composed of a majority of non-judicial members appointed directly by the executive and legislative authorities.

In the present case, the Court noted that during the deliberations of 10 January 2012, only six of the 15 members of the HCJ who adjudicated her case were judges. In the Court's view, it follows that the principles governing the composition of the HCJ have resulted in a situation whereby it may comprise a majority of non-judicial members appointed directly by the executive and legislative authorities.[144]

The Court observed that the HCJ's deliberation of 11 October 2011 was conducted with a majority of judges. It went on to note that the deliberation of 10 April 2012 was conducted with a majority of judges participating on account of the absence of a large number of non-judicial members of the HCJ; that the decision of 30 September 2014 was taken with 12 of the HCJ's 17 members present, including seven who were judges and five who were non-judicial members, the majority of judges again being due to the absence of four non-judicial members.

Consequently, the Court noted that, although in most cases judges had formed a majority of the members of the formation examining the case, they were in a minority during the deliberations on 10 January 2012. The Court found this situation within the Portuguese HCJ to be problematic from the standpoint of Article 6(1) of the Convention. Moreover, it noted with concern that, in the Portuguese legal system, the law did not provide for any specific requirement as regards the qualifications of non-judicial members of the

143 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 75.

144 Under Article 218(1) of the Portuguese Constitution, the High Council of the Judiciary is composed of seventeen members appointed by various bodies. It needs to be emphasised that two of these members are appointed directly by the President of the Republic, seven are elected by the Assembly of the Republic, and another seven elected by judges from among their peers. As observed by the Government, the usual composition of the HCJ consists of eight judges (including the President, who has a casting vote) and nine non-judicial members.

HCJ.[145] Consequently, the Court considered that the independence and impartiality of the High Council of the Judiciary may be open to doubt.

2. Scope of Review Performed by the Supreme Court of Justice

In cases, such as the present, domestic law provides for an application for judicial review of the lawfulness of an HCJ decision imposing a disciplinary penalty on a judge. The Court therefore had to ascertain whether the proceedings, to which the applicant had access, complied with the requirements of Article 6 of the Convention.

In the present case, it was not the Court's task, in the context of Article 6, to ascertain whether the decisions of the HCJ imposing penalties on the applicant complied with the domestic legislation, but rather to verify whether the scope of the judicial review conducted by the Supreme Court of Justice had been sufficient.

In the present case, the Supreme Court of Justice had jurisdiction to review the lawfulness of the HCJ's decision imposing disciplinary penalties on a judge. In carrying out that review, the Supreme Court of Justice could review the validity of the evidence, whether the facts had been adequately and coherently established, and whether the decision imposing the penalty was reasonable and proportionate.[146] The highest court thus had the power to set aside the decision on several grounds of unlawfulness linked to the procedural or substantive requirements laid down by law and to refer the case back to the HCJ for a fresh ruling in conformity with any instructions it issued regarding possible irregularities. However, the Supreme Court of Justice did not have the power to review the establishment of the facts by the HCJ; nor could it review the penalty that had been imposed; it could only decide whether or not it was proportionate to the offence. Under Portuguese law, the Supreme Court of Justice did not have jurisdiction to re-examine the facts as established by the HCJ. Likewise, it could not review the penalty imposed, but could only determine whether it had been appropriate to the offence and proportionate to it.[147]

Considering the question whether the Supreme Court of Justice had carried out a sufficiently broad review regarding the disciplinary power exercised by the HCJ, the Court noted that the applicant had disputed the facts established by the HCJ before the Supreme Court of Justice. In particular, the applicant asserted that she had not called H. G. a "liar" and had not asked that the

145 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 79.
146 *Ibid.,* para. 84.
147 *Ibid.*

disciplinary action against the witness, whom she had mentioned to Judge F. M. J., be dropped.[148]

In the Court's view, those were decisive facts for the outcome of the disciplinary proceedings which the Supreme Court of Justice had not reviewed, confining itself to merely reviewing the lawfulness in terms of establishment of the facts. The Court considered that, in reaching its decision, the Supreme Court of Justice had not duly examined substantial arguments submitted by the applicant.

With regard to reviewing questions of law, the Supreme Court of Justice considered that the powers of the HCJ fell outside the scope of that court's review where the disciplinary body ruled on conduct allegedly incompatible with a judge's duty of diligence. Accordingly, the Court concluded that the Supreme Court of Justice had a limited conception of the scope of its own powers of review of the HCJ disciplinary activities, and considered that the review carried out by the Supreme Court in the present case had been insufficient.[149]

3. Lack of a Public Hearing[150]

Contrary to the Government, the applicant complained that the cases had not been examined in the course of a public hearing, in breach of her right to a fair hearing within the meaning of Article 6(1) of the Convention. In support of her argument, she referred to the non-technical nature of the issues raised, particularly in Application no. 74041/13, and the discrepancy in the establishment of the facts relating to the content of her alleged remarks. The Supreme Court had refused her request for a public hearing in order to call a witness and produce documents, on the grounds that hearing a witness would go against the confidentiality of the proceedings and that the documents produced by her exceeded the object of the disciplinary proceedings. The Court also noted that the grounds given by the Supreme Court of Justice had been insufficient to justify the refusal to hear the witness, which ultimately led to a limitation of the applicant's ability to defend her case, in breach of the guarantees of a fair trial.

In the Court's view, by refusing to hear the witness, the Supreme Court of Justice had failed to guarantee the transparency which that procedural measure would have given to the disciplinary proceedings and, furthermore, had not remedied the refusal to hold a public hearing.[151]

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148 *Ibid.,* para. 86.

149 *Ibid.,* paras. 88–89.

150 *Ibid.,* paras. 90–99.

151 *Ibid.,* para. 96. Here the Court also referred *mutatis mutandis* to *Olujić v. Croatia*, App. no. 22330/05, Judgment of 05 February 2009, para. 76 and paras. 83–85; *Mehmet Emin Şimşek v. Turkey*, App no. 5488/05, Judgment of 28 February 2012, para. 28.

The Court reiterated that the public character of proceedings constituted a fundamental principle enshrined in Article 6(1) of the Convention. It protects litigants against the administration of justice in secret with no public scrutiny and thus constitutes one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[152]

The Court also observed that a public hearing, with oral submissions and accessible to the applicant, had been necessary in the present case because the facts had been in dispute and the penalties, which were liable to be imposed on a judge, carried a significant degree of stigma, which was likely to adversely affect the professional honour and reputation of the person concerned.[153]

Mindful of the need to strike the right balance between the need to protect the independence of the HCJ and the interest in ensuring its public control and in preventing corporatist management, the Court considered that the guarantee of a public hearing in disciplinary proceedings against judges contributed to their fairness for the purposes of Article 6(1), by ensuring an adversarial procedure, the highest degree of transparency towards judges and society and all the safeguards of a fair trial.[154] The Court therefore concluded that the domestic authorities had failed to provide the safeguards of a public hearing. In the instant case, in view of the cumulative effect of the above-mentioned factors, the Court concluded that there had been a violation of Article 6(1) of the Convention.

(c) Decision on just satisfaction

The applicant claimed EUR 43,750 in respect of the pecuniary damage she had allegedly sustained on account of the loss of salary. She did not lodge a claim in respect of non-pecuniary damage, submitting that a finding of a violation would constitute in itself sufficient just satisfaction in respect of the damage sustained. The Court observed that, in the present case, the only basis for awarding just satisfaction lied in the fact that the applicant had not had the benefit of the guarantees of Article 6 of the Convention. It is true that the Court cannot speculate as to the outcome of the proceedings had the

152 *Ibid.,* para. 92. The Court also referred to *Martinie v. France*, App. no. 58675/00, Judgment of 12 April 2006, para. 39; *Nikolova and Vandova v. Bulgaria*, App. no. 20688/04, Judgment of 17 December 2013, para. 67.

153 *Ramos Nunes de Carvalho E Sá v. Portugal*, para. 97. The Court referred *mutatis mutandis* to *Grande Stevens and Others v. Italy*, App. nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, Judgment of 4 March 2014, para. 122.

154 *Ibid.,* para. 98.

position been otherwise. Nevertheless, having regard to all the circumstances, and in accordance with its normal practice in civil and criminal cases as regards violations of Article 6(1) caused by a lack of objective or structural independence and impartiality, the Court did not consider it appropriate to award financial compensation to the applicant in respect of loss of salary allegedly flowing from the outcome of the domestic proceedings.[155] Hence, it did not see any causal link between the violations found and the pecuniary damage alleged, and therefore dismissed the applicant's claim.

The applicant also claimed EUR 2,500 for the costs and expenses incurred before the domestic courts. The Court reiterated that, where it found a violation of the Convention, it was entitled to award the applicant not only the costs and expenses incurred before it, but also those incurred before the national courts for the prevention or redress of the violation, provided that they have been proved to be necessary, that the requisite receipts have been produced – which was not the case here – and that the amounts claimed were not unreasonable. In the instant case, in view of the documents in its possession and its case-law, the Court dismissed the claim in respect of the costs and expenses incurred in the domestic proceedings.

The Court dismissed, by six votes to one, the claim for just satisfaction lodged by the applicant. It dismissed, by six votes to one, the remaining claim for just satisfaction.

155 The Court also referred *mutatis mutandis* to the case of *Kingsley v. the United Kingdom,* App. no. 35605/97, Judgment of 28 May 2002, para. 43.

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Nuray Şen v. Turkey (No. 2), 25354/94, (2004)

Olaru and Others v. Moldova, 476/07, 22539/05, and 17911/08 (2009)

Oleksandr Volkov v. Ukraine, 21722/11 (2013)

Olujić v. Croatia, 22330/05 (2009)

Osman v. the United Kingdom, 87/1997/871/1083 (1998)

Parizov v. the former Yugoslav Republic of Macedonia, 14258/03 (2008)

Pavlyulynets v. Ukraine, 70767/01 (2005)

Pellegrin v. France, 28541/95 (1999)

Perez v. France, 47287/99 (2004)

Petrovic v. the former Yugoslav Republic of Macedonia, 30721/15 (2017)

Pierre-Bloch v. France, 120/1996/732/938 (1997)

Plazonić v. Croatia, 26455/04 (2008)

Počuča v. Croatia, 38550/02 (2006)

Qufaj Co. SH.P.K. v. Albania, 54268/00 (2004)

Ramadhi and Others v. Albania, 38222/02 (2007)

Ramos Nunes de Carvalho E Sá v. Portugal, 55391/13, 57728/13 and 74041/13 (2016)

Raylyan v. Russia, 22000/03 (2007)

Regner v. the Czech Republic, 35289/11 (2015)

Rolf Gustafson v. Sweden, 23196/94 (1997)

Sabin Popescu v. Romania, 48102/99 (2004)

Sacilor-Lormines v. France, 65411/01 (2006)

Saez Maeso v. Spain, 77837/01 (2004)

Saghatelyan v. Armenia, 7984/06 (2015)

Scordino v. Italy, 43662/98 (2006)

Skubenko v. Ukraine, 41152/98 (2004)

Sokurenko and Strygun v. Ukraine, 29458/04 and 29465/04 (2006)

Sramek v. Austria, 8790/79 (1984)

Stafford v. the United Kingdom, 46295/99 (2002)

Stakić v. Montenegro, 49320/07 (2012)

Stanka Mirković and Others v. Montenegro, 33781/15 and 3 others (2017)

Stevanović v. Serbia, 26642/05 (2007)

Surmeli v. Germany, 75529/01 (2006)

Sharra and Others v. Albania, 25038/08, 64376/09, 64399/09, 347/10, 1376/10, 4036/10, 12889/10, 20240/10, 29442/10, 29617/10, 33154/11 and 2032/1 (2015)

Themeli v. Albania, 63756/09 (2013)

Vallianatos and Others v. Greece, 29381/09 and 32684/09 (2013)

Vilho Eskelinen and Others v. Finland, 63235/00 (2007)

Vrioni and Others v. Albania, 35720/04 and 42832/06 (2010)

Vučković and Others v. Serbia, 17153/11 and 29 others (2014)

Vukelić v. Montenegro, 58258/09 (2013)

Vuković v. Montenegro, 18626/11 (2012)

Zagorodnikov v. Russia, 66941/01 (2007)

Z and Others v. the United Kingdom, 29392/95 (2001)

Živaljević v. Montenegro, 17229/04 (2011)

Chapter 3: RIGHT TO DATA PROTECTION UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 8
Right to respect for private and family life

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

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

I INTRODUCTION

This Chapter deals with the right to data protection, as determined by Article 8 of the Convention. Under Article 8 of the Convention, a right to protection against the collection and use of personal data forms part of the right to respect for private and family life, home and correspondence. As we can see, Article 8 of the Convention lays down a broad spectrum of conditions under which restrictions of this right are permitted. As the Court has constantly reiterated, the concept of "private life" is a broad term not susceptible to exhaustive definition.[156] The Convention accepts different levels of protection depending on the type of data. The Court has clarified that Article 8 of the Convention not only obliges States to refrain from any actions that might violate this Convention right (negative obligation), but that they in certain circumstances also have a positive obligation to actively

156 See *e.g. Vukota-Bojić v. Switzerland,* App. no. 61838/10, Judgment of 18 October 2016, para. 52; *S. and Marper v. the United Kingdom,* App. nos. 30562/04 and 30566/04, Judgment of 4 December 2008, para. 66.

secure effective respect for private and family life.[157] This positive obligation comprises also the protection a respondent State must guarantee in order to protect interference by third parties.[158]

The central part of the Chapter outlines the concept of data protection under Article 8 of the Convention, together with the criteria for establishing whether a refusal to provide the information can be regarded as an "interference", as well as the standards for ascertaining whether such an "interference" was justified. As the Court has constantly highlighted, it is important that the *domestic law* affords *appropriate and sufficient safeguards* in the system for the use, disclosure and retention of data to ensure that personal data relating to the applicant's private life would not be inconsistent with or disclosed in violation of Article 8 of the Convention.[159]

To illustrate the reasoning of the Court and to show the principles upon which the right to data protection has been construed by the Court, this Chapter also provides readers with short comments, a summary and case briefs of *L. H. v. Latvia*[160] and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*.

GENERAL OBSERVATIONS

Article 8 protects personal information which individuals can legitimately expect should not be published without their consent. Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail and other forms of communication and informational privacy, including online information. Moreover, the concept of private life includes elements relating to a person's right to their image[161].

There are various crucial stages at which data protection issues under Article 8 of the Convention may arise, including during the collection, storage, use and communication of data. At each stage, the interferences with the applicant's right to respect for his/her private life should be justified,

157 *Joanna Szulc v. Poland*, App. no. 43932/08, Judgment of 13 November 2012, para. 84; *Copland v. the United Kingdom*, App. no. 62617/00, Judgment of 3 April 2007, paras. 43–44. See also *Handbook on European data protection law,* Luxembourg, Publications Office of the European Union, 2014, p. 15.

158 See *e.g. Mitkus v. Latvia*, App. no. 7259/03, Judgment of 2 October 2012; *K. U. v. Finland,* App. no. 2872/02, Judgment of 2 December 2008.

159 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. no. 931/13, Judgment of 27 June 2017, para. 137.

160 *L. H. v. Latvia*, App. no. 52019/07, Judgment of 29 April 2014.

161 *Internet: case-law of the European Court of Human Rights,* Council of Europe/European Court of Human Rights, updated, June 2015, pp. 7–8.

in accordance with the law[162] and the law must clearly define the authorities' discretionary powers in this area.[163]

Domestic law should, notably, ensure that such data are relevant and not excessive in relation to the purposes for which they are stored, and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. It must also afford adequate guarantees that retained personal data are efficiently protected from misuse and abuse,[164] especially regarding the protection of special categories of more sensitive data. The collection, processing and use of the data has its limitations and any interferences should thus be proportionate and pursue the legitimate aims of protecting national security, public safety and the rights of the victims, and of preventing crime.[165]

In the European Convention on Human Rights system, data protection falling under the scope of Article 8 should be applied while respecting the scope of other *competing rights*. Consequently, the ECtHR has repeatedly stated that a balancing exercise of this and other rights is necessary when applying and interpreting Article 8 of the Convention. One of the rights most commonly competing with the right to data protection is the right to freedom of expression enshrined in Article 10 of the Convention.[166] Moreover, ensuring this balance is all the more important in view of specific interests in a given social context where the rights to data protection and freedom of expression are influenced by the rapidly developing communication technologies.[167]

This system is also witnessing the emergence of new concepts, such as data portability and the right to be forgotten, in the specific context of Internet/ online data (as the Court of Justice of the European Union recognised in its judgment of 13 May 2014[168]). In other words, it encompasses the data subject's right to object to the further processing of his/her personal data, and the data controller's obligation to delete the information as soon as

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162 See *e.g. Amann v. Switzerland*, App. no. 27798/95, Judgment of 16 February 2000; *Taylor-Sabori v. the United Kingdom*, App. no. 47114/99, Judgment of 22 October 2002; *P. G. and J. H. v. the United Kingdom*, App. no. 44787/98, Judgment of 25 September 2001.

163 *Vukota-Bojić v. Switzerland,* paras. 76–77; *M. M. v. the United Kingdom*, App. no. 24029/07, Judgment of 13 November 2012, para. 194; *Amann v. Switzerland*, para. 62.

164 *S. and Marper v. the United Kingdom,* para. 103; *M. M. v. the United Kingdom*, para. 195.

165 *E.g. Uzun v. Germany,* App. no. 35623/05, Judgment of 2 September 2010; *Leander v. Sweden*, App. no. 9248/81, Judgment of 23 March 1987. See also *Factsheet-Personal data protection,* Press Unit, ECtHR, Strasbourg, June 2017.

166 See *e.g. Delfi AS v. Estonia,* App. no. 64569/09, Judgment of 16 June 2015; *Couderc and Hachette Filipacchi Associés v. France,* App. no. 40454/07, Judgment of 10 November 2015; *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*, App. no. 62322/14, Judgment of 5 January 2015.

167 See for more information *Internet: case-law of the European Court of Human Rights*.

168 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González,* CJEU (Grand Chamber), Judgment of 13 May 2014.

it is no longer needed for processing. Although there have still been no such developments in this regard, the Court has, in the face of such new challenges, been particularly vigilant as regards the duration of retention of data and the existence of a real possibility of requesting their deletion.[169] In various cases, given that a procedure existed for requesting the data to be removed from the database, the Court has come to the view that it falls under the scope of Article 8.[170] Thus, for example, in *S. and Marper*, the Court noted that the core principles of the relevant instruments of the CoE, and the law and practice of other Contracting Parties, required retention of data to be proportionate in relation to the purpose of collection and limited in time, particularly in the police sector.[171]

In today's reality, the right to data protection is considered a subject of major concern affecting all of us, wherefore increasing efforts are invested in improving the system of data protection. Within the European area, there are some core instruments in this regard, including Council of Europe Convention No 108, the European Convention on Human Rights, European Union (EU) instruments/legislation, as well as the case law of the ECtHR and of the CJEU.

We have been facing new developments in the field of data protection especially since the Treaty of Lisbon came into force. As opposed to the Convention, EU law recognises data protection as a fundamental human right in Article 8[172] separately from the right to respect for private and family life in Article 7[173] of the Charter of Fundamental Rights of the European Union ("EU Charter"). It was regulated for the first time by the 1995 Data Protection Directive, which was replaced by the new Directive adopted in 2016.[174]

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169 See *Internet: case-law of the European Court of Human Rights,* pp. 13–14, *e.g. Brunet v. France*, App. no. 21010/10, Judgment of 18 September 2014; *Khelili v. Switzerland,* App. no. 16188/07, Judgment of 18 October 2011; *M. M. v. the United Kingdom.*

170 *B. B. v. France,* App. no. 5335/06, Judgment of 17 December 2009; *Gardel v. France,* App. no. 16428/05, Judgment of 17 December 2009. See *Internet: case-law of the European Court of Human Rights,* pp. 12–13.

171 *Handbook on European data protection law,* p. 73.

172 Under Article 8 "Protection of personal data":

"1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

173 Under Article 7 "Respect for private and family life":

"Everyone has the right to respect for his or her private and family life, home and communications."

174 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data

It is important to underline that although the EU may grant more extensive protection of fundamental rights and freedoms enshrined in the EU Charter compared with the European Convention on Human Rights, the meaning and scope of rights enshrined in the EU Charter shall be the same as those laid down by the Convention, as stipulated by Article 52(3) of the EU Charter. Furthermore Article 53 lays down that the EU Charter cannot restrict human rights as recognised by the European Convention of Human Rights

RIGHT TO DATA PROTECTION: SCOPE AND PROCEEDINGS BEFORE THE COURT

1. Judicial Construction of the Right to Data Protection

In its well established case-law, the Court dealt with many cases concerning the collection, storage, processing and use of personal data. The ECtHR has examined many situations in which the issue of data protection arose, not least those concerning interception of communication, data used for police purposes, various forms of surveillance and protection against storage of personal data by the public authorities, data that underwent automatic processing, and Internet/online data,[175] but also where the authorities had failed to give effect to that right. In one of its landmark judgments, *S. and Marper v. the United Kingdom,* the Court opined:

> "The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article [...]. The subsequent use of the stored information has no bearing on that finding [...] However, in determining whether the personal information retained by the authorities involves any [...] private-life [aspect, ...], the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained [...]."[176]

Protection Regulation). The new Regulation will come into effect in all Member States on 25 May 2018.

175 *E.g. Delfi AS v. Estonia*; *Bărbulescu v. Romania*, App. no. 61496/08, Judgment of 30 November 2016; *Vukota-Bojić v. Switzerland*; *R. E. v. the United Kingdom*, App. no. 62498/11, Judgment of 27 October 2015; *P. G. and J. H. v. the United Kingdom*, App. no. 44787/98, Judgment of 25 September 2001; *B. B. v. France*; and *M. B. v. France*, App. no. 22115/06, Judgment of 17 December 2009. See also *Handbook on European data protection law*, p. 15; *Factsheet-Personal data protection, op. cit*.

176 *S. and Marper v. the United Kingdom,* para. 67.

In this case, the Court observed in particular that the use of modern scientific techniques (particularly in the criminal-justice system) could not be allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. It noted that any State claiming a pioneer role in the development of new technologies bore special responsibility for "striking the right balance".[177]

In this context, the Court has considered that, apart from the negative obligation, the respondent State also has a positive obligation to provide an effective and accessible procedure, enabling the applicant to have access to all relevant and appropriate information.[178] In another of its landmark decisions, *Joanna Szulc v. Poland*, the Court noted that:

> "The Court recalls that, in addition to the primarily negative undertakings in Article 8 of the Convention, there may be positive obligations inherent in effective respect for private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of Article 8 being of certain relevance [...]."[179]

Access to personal data has its limitations, on reasonable grounds such as the protection of national security, fight against terrorism, prevention of crime, etc.[180] The Court reiterated that having regard to the wide margin of appreciation available to the States to lay down these limitations in their domestic law, States were entitled to consider whether such limitations prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the secret files/register.[181]

2. Scope of the Right to Data Protection

Generally, the scope of the right to data protection includes compilation, access, storage, usage, and disclosure of personal data. There are various crucial stages at which data protection issues under Article 8 of the Convention

177 *Ibid.,* para. 112.

178 See *e.g. Haralambie v. Romania,* App. no. 21737/03, Judgment of 27 October 2009, paras. 87–89; *Jarnea v. Romania,* App. no. 41838/05, Judgment of 19 July 2011, para. 60.

179 *Joanna Szulc v. Poland,* para. 84.

180 See *e.g. Segerstedt-Wiberg and Others v. Sweden,* App. no. 62332/00, Judgment of 6 June 2006; *Szabó and Vissy v. Hungary*, App. no. 37138/14, Judgment of 12 January 2016.

181 *E.g. Leander v. Sweden; Szabó and Vissy v. Hungary; Joanna Szulc v. Poland*; *Segerstedt-Wiberg and Others v. Sweden; Vukota-Bojić v. Switzerland; Haralambie v. Romania*. See *Factsheet-Personal data protection, op. cit.*

may arise, including during the collection, storage, use and communication of data. At each stage, appropriate and adequate safeguards, which reflect the principles elaborated in applicable data protection instruments and prevent arbitrary and disproportionate interference with Article 8 rights, must be in place.[182]

The Court has paid particular attention to the protection of personal data with respect to their automatic processing, emphasising the need for proper safeguards.[183] This embraces even those parts of the information that was public, since the information had been systematically collected and stored in files held by the authorities.

Article 8 of the Convention invokes both negative and positive obligations of the respondent State. Therefore, it not only obliges States not to violate this Convention right, but it also requires of them to actively secure effective respect for private and family life, comprising also the protection a respondent State must guarantee in order to protect interference by other individuals.[184]

3. Proceedings before the Court

The proceedings before the Court, instituted with regard to data protection, comprise two stages. In the first stage, the Court decides whether the application falls within the scope of Article 8 of the Convention. If it does, the Court moves to the second stage and reviews whether the State has complied with the requirements of Article 8. If it has not and there has been an interference with the right protected by Article 8, the Court must ascertain whether the case concerns the negative or positive obligation of the State.

If the Court finds that the case concerns a negative obligation and that there has been an interference with the right protected by Article 8 of the Convention, then it has to examine whether the State's interference was justified under this Article, *e.g.* whether it was:

(a) in accordance with the law;

(b) in pursuit of a legitimate aim; and,

(c) necessary in a democratic society.

If the Court finds that the case concerns positive obligations, it must consider whether the importance of the interest at stake requires the imposition of the

182 *M. M. v. the United Kingdom,* para. 195.

183 *S and Marper v. the United Kingdom*, para. 103.

184 *E.g. Mitkus v. Latvia*; *K. U. v. Finland*. See *Factsheet-Personal data protection, op. cit*.

positive obligation sought by the applicant, having regard to the fair balance that must be struck between the competing interests in the case.[185]

CRITERIA FOR DETERMINING WHETHER THERE WAS AN INTERFERENCE BY A PUBLIC AUTHORITY WITH THE RIGHT TO DATA PROTECTION

Given the multiple aspects of data protection under Article 8, the Convention does not recognise a stand-alone approach to data protection. Rather, the following criteria have to be considered to determine in each particular case whether access to the data/information is instrumental for the individual's exercise of his or her right under Article 8 of the Convention, and whether its denial constitutes an interference with that right:

1. Purpose of Data Access and Disclosure: Balancing Interests

The information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

The definition of what might constitute a subject of public interest will depend on the circumstances of each case. Permitting public access to official documents, including taxation data, is designed to secure the availability of information for the purpose of enabling a debate on matters of public interest.[186] Public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. Public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism.[187] In order to ascertain whether a publication relates to a subject

185 *Handbook on European data protection law,* pp. 22–28. See also *Factsheet-Personal data protection, op. cit.*

186 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* para. 172.

187 *Ibid.,* para. 171.

of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears.[188]

2. Nature of the Data

Given the interpretation and application of the broad scope covered by Article 8, various data fall under the protection of this Article.

In various cases, the Court considered that the collection and storage of personal information relating to the applicant's use of the telephone, e-mail and Internet, (correspondence) without his/her knowledge, had amounted to an interference with his/her right to respect for private life and correspondence.[189] While leaving open the question whether the monitoring of an employee's use of the telephone, e-mail or Internet at the workplace might be considered "necessary in a democratic society" in certain situations and in pursuit of a legitimate aim, the Court concluded that, in the absence of any domestic law regulating monitoring at the material time, the interference was not found to be "in accordance with the law".[190] Some judgments regard the issue of whether employers can access their employees' private communication at the workplace.[191] For the first time, in *Bărbulescu v. Romania* the Court ruled on a case concerning the monitoring of an employee's electronic communication by a private employer, and therefore contributing to its case-law development.[192] The Court examined whether the State, in the context of its positive obligations under Article 8, struck a fair balance between the applicant's right to respect for his private life and correspondence and his employer's interests. In this regard, the Court referred to its findings as to the scope of the complaint limited to the monitoring of the applicant's communications within the framework of disciplinary proceedings.[193]

In his partly dissenting opinion, Judge Pinto De Albuquerque noted: "The case presented an excellent occasion for the European Court of Human Rights ("the Court") to develop its case-law in the field of protection of privacy with regard to employees' Internet communications. The novel features of this case concern the non-existence of an Internet surveillance policy, duly implemented and enforced by the employer, the personal and sensitive nature of the employee's communications that were accessed by the employer, and the wide scope of disclosure of these communications

188 *Ibid.,* para. 170.

189 See *Copland v. the United Kingdom*, para. 44.

190 *Ibid.,* para. 48.

191 *Ibid.,* paras. 41–42. See also *Bărbulescu v. Romania,* paras. 36–38.

192 In *Bărbulescu v. Romania*, the Court clearly stated that this case differs from previous similar ones, para. 39.

193 *Bărbulescu v. Romania*, paras. 54–55.

during the disciplinary proceedings brought against the employee. These facts should have impacted on the manner in which the validity of the disciplinary proceedings and the penalty was assessed. Unfortunately, both the domestic courts and the Court's majority overlooked these crucial factual features of the case."[194]

The Court has pointed out that the data of various *activities of a professional or business nature* fall under the scope of the Convention as well.[195]As the Court has noted, telephone calls from business premises are prima facie covered by the notions of "private life", as well as "correspondence".

After reviewing whether the balance of interests between the parties had been secured in some cases, the Court highlighted that since the employer accessed the messages on the assumption that they would solely be of a professional nature, such access had been legitimate and the employer thereby acted within its disciplinary powers.

3. The Role of the Applicant

Regarding access to personal data, every person is allowed to have access to his or her own personal data without being obliged to specifically justify their requests for such access.[196] The Court specified that it was rather for the authority in possession of the data to show that there were compelling reasons for refusing this facility.

In *Brunet v. France*, previously cited, the Court found that there was no possibility for the applicant to have the information concerning him deleted in practice, and that the 20-year period during which the information could be kept in the database was virtually an indefinite period. Consequently, the Court held that the domestic law did not lay down limits on the age of information held or the length of time for which it could be kept, wherefore it did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

4. Available Data and Level of Protection

The Convention protects a variety of data related to private and family life, home and correspondence. As for the disclosure of and access to personal data, an issue arose concerning the authorities' refusal to provide access to

194 *Ibid.,* partly dissenting opinion of judge Pinto De Albuquerque, para. 2.

195 *Bărbulescu v. Romania*.

196 See *e.g. K. H. and Others v. Slovakia*, App. no. 32881/04, Judgment of 28 April 2009.

such data when the information was classified as personal data that could not be subject to disclosure under domestic law.[197]

With regard to access to personal files held by the public authorities, with the exception of information related to national security considerations, the Court has recognised a vital interest protected by Article 8 of the Convention, of persons wishing to receive information necessary to know and to understand their childhood and early development, or to trace their origins, in particular the identity of their natural parents or information concerning health risks to which they might be exposed.[198]

In these contexts, the Court has considered that the respondent State has a positive obligation to provide an effective and accessible procedure, enabling the applicant to have access to all the relevant and appropriate information.[199]

STANDARDS TO ESTABLISH WHETHER AN "INTERFERENCE" WITH THE RIGHT TO DATA PROTECTION WAS JUSTIFIED

In order to be justified, the state authorities' refusal to disclose and provide access to relevant data must be "prescribed by law", pursue one or more of the legitimate aims mentioned in Article 8(2) and be "necessary in a democratic society".

1. "Prescribed by Law"

The word "law" encompasses not only primary legislation, but secondary rules and judicial case-law as well, thus covering all the domestic legal rules that allow for interferences with fundamental rights. However, the Court has also laid stress on the quality of law, noting that legal rules falling short of the relevant quality were not "law" in terms of the Convention.[200]

As mentioned, domestic law should provide a wide range of appropriate and adequate safeguards against abusive and arbitrary actions, safeguards which

197 See *e.g. Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, Judgment of 8 November 2016.

198 *Joanna Szulc v. Poland*, para. 85. Other examples should be: *Odièvre v. France,* App. no. 42326/98, Judgment of 13 February 2003; *Antoneta Tudor v. Romania*, App. no. 23445/04, Judgment of 24 September 2013; *L. H. v. Latvia*; *Roche v. the United Kingdom*, App. no. 32555/96, Judgment of 19 October 2005; *Godelli v. Italy,* App. no. 33783/09, Judgment of 25 September 2012.

199 *Haralambie v. Romania*; *Jarnea v. Romania*.

200 *Amann v. Switzerland*, paras. 55–62.

reflect the principles elaborated in applicable data protection instruments, the necessity and proportionality of the data storage/transmission order in the light of the evidence gathered and the seriousness of the case.[201] For example, in *Roman Zakharov v. Russia*,[202] the Court found a violation of Article 8, noting that the legal provisions governing interception of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which was inherent in any system of secret surveillance, particularly high in certain systems (as in Russia), where the secret services and the police had direct access, by technical means, to all mobile telephone communications.

Consequently, the Court has repeatedly emphasised that a fair balance needs to be struck between competing public and private interests,[203] that a margin of appreciation must be left to the national authorities in their assessment whether an interference is necessary,[204] and that the interference must be regarded as necessary in a democratic society.[205] The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. In particular, in both instances, regard must be had to the fair balance that has to be struck between the competing interests, and the State enjoys a certain margin of appreciation in both contexts. However, the competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life and correspondence are being made possible by new, increasingly sophisticated technologies.[206]

If the applicable law fails to indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise, the Court will have found a violation of Article 8 of the Convention. In *L. H. v. Latvia,* the Court noted:

> "Of particular relevance [...] is the requirement for the impugned measure to have some basis in domestic law, which should be compatible with the rule of law, which, in turn, means that the domestic law must be formulated with sufficient precision

201 See *e.g. Figueiredo Teixeira v. Andorra*, App. no. 72384/14, Judgment of 8 November 2016; *Sõro v. Estonia*, App. no. 22588/08, Judgment of 3 September 2015.

202 *Roman Zakharov v. Russia*, App. no. 47143/06, Judgment of 4 December 2015.

203 *Aycaguer v. France*, App. no. 8806/12, Judgment of 22 June 2017; *Godelli v. Italy,* App. no. 33783/09, Judgment of 25 September 2012.

204 *Peruzzo and Martens v. Germany*, App. nos. 7841/08 and 57900/12, Judgment of 4 June 2013; *M. K. v. France,* App. no. 19522/09, Judgment of 18 April 2013.

205 *Brunet v. France*; *S. and Marper v. the United Kingdom, op. cit*.

206 *E.g. Köpke v. Germany*, App. no. 420/07, Judgment of 5 October 2010; *Szabó and Vissy v. Hungary.*

and must afford adequate legal protection against arbitrariness. Accordingly, the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise."[207]

2. "Legitimate Aim"

Article 8(2) enumerates the following legitimate aims justifying restrictions on data protection:

- the protection of national security;
- the protection of public safety;
- the economic well-being of the country;
- the prevention of disorder or crime;
- the protection of health;
- the protection of morals; and,
- the protection of the rights and freedoms of others.

As mentioned above, the Court has ruled that the need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. In other cases, the Court could not call into question the prevention-related objectives of the database. Moreover, the Court took the view that the length of the data conservation was not disproportionate to the aim pursued by the retention of the information. Lastly, the consultation of such data by the court, police and administrative authorities was subject to a duty of confidentiality and was restricted to precisely determined circumstances.[208]

In numerous cases, the Court recognised that, particularly in proceedings related to the operations of state security agencies, there might be legitimate grounds to limit access to certain documents and other materials.[209] However, in respect of lustration proceedings, that consideration lost much of its validity, particularly since such proceedings were by their nature oriented towards the establishment of facts dating from the communist era and were not directly linked to the current functions of the security services. The Court reiterated in particular the vital interest for individuals, who were the subject

207 *L. H. v. Latvia,* para. 47.

208 *E.g. Uzun v. Germany; B. B. v. France*; *Gardel v. France*; and *M. B. v. France*; *J. P. D. v. France,* App. no. 55432/10, Judgment of 16 September 2014.

209 *E.g. Turek v. Slovakia*, App. no. 57986/00, Judgment of 14 February 2006.

of personal files held by the public authorities (files created by the secret service under the communist regime), to be able to have access to them and emphasised that the authorities had a duty to provide an effective procedure for obtaining access to such information.[210]

3. "Necessary in a Democratic Society"

Further on, the Court considered that it was important that a Government's arguments be sufficient to show that the interference had been "necessary in a democratic society" and held that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there should be a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued (protection of the rights of others). The Court held that the interference in the applicant's private life should be justified in view of the fundamental importance of protecting personal data. The Court further noted that domestic law had to provide sufficient safeguards as regards the use in this type of proceedings of data concerning the parties' private lives, thus justifying *a fortiori* the need for a strict review as to the necessity of such measures.[211]

To determine whether an interference is justified in a democratic society, the Court assesses the different safeguards provided by domestic legislation, such as:

- The data are relevant and not excessive regarding the purposes for which they are stored;
- The data are preserved in a form permitting the identification of the data subjects;
- The data are stored for no longer than is required for the purpose for which they are retained;
- The law provides adequate safeguards that retained personal data are efficiently protected from misuse and abuse;
- The confidentiality requirement imposed on persons who may have access to certain data, especially sensitive data;
- Procedures guaranteeing the integrity of the data;
- Procedures for data disclosure and destruction; and,
- The informative value of the data.

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210 *Joanna Szulc v. Poland*, paras. 87 and 94.

211 *E.g. L. L. v. France*, App. no. 7508/02, Judgment of 10 October 2006; *Radu v. the Republic of Moldova*, App. no. 50073/07, Judgment of 15 April 2014.

4. Balancing Rights

The right to data protection under Article 8 of the Convention is not an absolute right; it must be balanced against other rights. The ECtHR developed in its case-law some crucial criteria regarding the balancing of the right to data protection against other fundamental rights, especially the freedom of expression: an interference is to be in accordance with the law; it has to pursue the legitimate aim of protecting the individuals' privacy; whether or not the expression at issue contributes to a debate of general public interest; the proportionality of the competing interest in a certain case, in order to strike a fair balance between the right to privacy and the right to freedom of expression.[212]

The vast majority of cases in which the Court had to examine whether the domestic authorities had balanced press freedom under Article 10 and the right to privacy under Article 8 of the Convention regarded alleged infringements of the right to privacy of a named individual or individuals due to the publication of particular material. In one of its landmark judgments, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, the Court noted that "[B]earing in mind the need to protect the values underlying the Convention and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, it is important to remember that the balance to be struck by national authorities between those two rights must seek to retain the essence of both."[213]

II SELECTED CASES: COMMENTS AND CASE BRIEFS

In *L. H. v. Latvia*, the Court emphasised the importance of the protection of medical data to a person's enjoyment of the right to respect for private life. As the Court noted, Article 8 of the Convention is violated if the applicable law fails to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise. To avoid the risk of abuse of medical data, it would be sufficient to put in place legislative safeguards with a view to strictly limiting the circumstances under which such data can be disclosed, as well as the scope of persons entitled to have access to the files.

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212 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* para. 198. See also *Von Hannover v. Germany (No. 2)*, App. nos. 40660/08 and 60641/08, Judgment of 7 February 2012; *Magyar Helsinki Bizottság v. Hungary; Couderc and Hachette Filipacchi Associés v. France*.

213 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* para. 123.

The Court ruled that, taking into account the domestic legislation at the time, the existing legal framework did not sufficiently guarantee the rights of an individual in the context of the collection and processing of patient data (including medical data) by a public institution. It further emphasised that the competence of the Health Inspectorate had not been defined with sufficient clarity and precision, and that the respective data subject (the patient) had not been not afforded adequate legal protection against arbitrariness, thus confirming a violation of Article 8 of the Convention.

In this case, an issue was raised concerning the domestic authorities' refusal to provide information classified as personal data, data that could not be subject to disclosure under the domestic health care law at the time. With regard to access to personal files held by the public authorities, the Court recognised a vital interest protected by Article 8 of the Convention, of persons wishing to receive information concerning health issues/risks to which they may be exposed. In these contexts, the Court has considered that the respondent State has a positive obligation to provide an effective and accessible procedure, enabling the applicant to have access to all her relevant and appropriate health information.

Because of this noteworthy judgment, Latvia made essential changes in its legislation on the protection of medical data, including a review of the quality of health care and clarification of the competences of public agencies.

After proceedings at the national level that lasted over eight years, and a preliminary ruling by the Court of Justice of the European Union (CJEU) on 16 December 2008, the ECtHR delivered its judgment in the case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* – an extremely interesting case regarding the conflicting right to privacy and the right to freedom of expression, concerning the protection of personal data (taxation data) and data journalism. This decision was highly publicised, *inter alia*, given the serious impact ECtHR judgments have had on interpreting notions of public interest and journalistic activity in the context of guaranteeing the right to freedom of expression in the areas of data journalism, digital media and journalistic data processing in the Contracting Parties. The controversial character of this approach by the ECtHR Grand Chamber is robustly reflected in the dissenting opinions of a few judges of the Court. There are major debates on whether the ECtHR has not only accepted a restrictive interpretation of the notion of journalistic activity, but has also reduced the impact of the right to information of public interest by finding no violation of the right to freedom of expression and information in this case.

Contrary to the latest developments in the EU legal framework aiming to broaden the journalism exception, as reflected in EU Regulation 2016/679 of 27 April 2016 *on the protection of natural persons with regard to the*

processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), the ECtHR judgment seems to be going in the opposite direction, by accepting, endorsing, and even developing a narrow notion of journalism.

Article 85 of the EU Regulation, which will replace the journalistic purposes derogation in Article 9 of the abovementioned Directive, no longer refers to the exception "*solely for journalistic purposes*", but obliges the Member States to "reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes [...]".

The *Satakunnan* case is also one of the very few cases in which a reference by a domestic (Finnish) Court for a preliminary ruling by the CJEU had direct impact on the development and evolution of EU law.

From the *Satakunnan* judgment some issues arise: the ECtHR ruling confirmed that there was no overall protection for journalism under data protection legislation. It simultaneously reemphasised the importance of the public interest value of the publications and its significant role in the Court's reasoning. To a broader extent, it called on the Court to take a proper approach to balancing data privacy rights under Article 8 of the Convention against freedom of expression, guaranteed in Article 10 of the Convention, not only in the context of domestic legislation, but in the international and regional legal framework as well.

CASE OF L. H. V. LATVIA
(Final Judgment of 29 July 2014)

CASE BRIEF

I FACTS

The applicant, a Latvian woman, gave birth to her baby in the Cēsis District Central Hospital (a municipal enterprise) in 1997. Caesarean section was performed with the applicant's consent because her uterine ruptured during labour. In the course of that surgery, the surgeon performed tubal ligation (surgical contraception) without the applicant's consent, resulting in her sterilisation.

On 19 February 2004, the director of the Cēsis hospital wrote to the Inspectorate of Quality Control for Medical Care and Fitness for Work (hereinafter "the MADEKKI"[214]), requesting of it to evaluate the treatment received by the

214 At the time, MADEKKI was the institution responsible for monitoring the quality of health care provided by Latvian medical institutions.

applicant during childbirth in accordance with the legislation in force in 1997. Thus, the MADEKKI initiated an administrative inquiry concerning the gynaecological and childbirth assistance provided to the applicant from 1996 to 2003. The MADEKKI received medical files from three medical institutions containing detailed information about the applicant's health over that period. In May 2004, it issued a report containing sensitive and private medical details about the applicant and sent the summary of its conclusions to the hospital director. It concluded that no laws had been violated during the applicant's antenatal care or during childbirth.

Following an unsuccessful attempt to achieve an out-of-court settlement, the applicant brought civil proceedings against the hospital seeking to recover damages for the unauthorised tubal ligation in February 2005 and, in December 2006, she was awarded compensation in the amount of 10,000 Latvian *lati* for the unlawful sterilisation.

The applicant's lawyer lodged a claim before the administrative courts, complaining that the MADEKKI inquiry had been unlawful, in particular since its essential purpose had been to help the hospital gather evidence for the impending litigation, which was outside the MADEKKI's remit. It was also alleged that the MADEKKI had acted unlawfully in requesting and receiving information about the applicant's health, as it had breached the applicant's right to respect for her private life, further violated when the MADEKKI unlawfully transferred the applicant's data to the Cēsis hospital. Lastly, the applicant requested to annul an administrative act – the MADEKKI's report – since its findings were erroneous.

The applicant's claim was rejected by the Administrative District Court in a decision eventually upheld by the Senate of the Supreme Court in February 2007, in which reference was made to Article 8 of the Convention.[215] The Senate of the Supreme Court further considered that this report was not an action of a public authority (*faktiskā rīcība*) and thus was not amenable to review in administrative courts. The Senate of the Supreme Court, when summarising the findings of ECtHR in two cases invoked here by the applicant, emphasised in particular that the Convention left to the States a wide margin of appreciation in balancing the confidentiality of medical data and the necessity to preserve the patients' confidence in the medical profession and in the health services in general. According to the Supreme

215 On 12 May 2005, the Administrative District Court decided to terminate the proceedings with regard to the request to annul the MADEKKI report, since, in its opinion, the report did not create any specific rights or obligations for the applicant and thus could not be considered an administrative act, and dismissed the remainder of the application as ill-founded. An appeal was filed with the Administrative Regional Court (in June 2006), which adopted a judgment fully upholding the first-instance court's judgment and endorsing its reasoning, essentially equating MADEKKI's activities with the provision of health care, which was a legitimate reason for gathering personal data under domestic law.

Court, the MADEKKI had a legal duty to control the quality of medical care. In order to carry out such control, the MADEKKI required information about the patient and his/her care.

The Supreme Court based its reasoning on the applicable domestic legal framework, namely the Medical Treatment Law, the Personal Data Protection Law and the statute of the MADEKKI. It concluded the MADEKKI was authorised to collect and process the applicant's sensitive and confidential data in order to monitor the quality of medical care under the Medical Treatment Law and that the Personal Data Protection Law permitted the processing of sensitive personal data without the data subject's written consent for the purposes of medical treatment or the provision or administration of health care services or if processing of personal data was necessary for a system administrator to carry out his legal duties.[216]

The applicant complained to the ECtHR, complaining that, by collecting her personal medical data, the MADEKKI, had violated her rights under Article 8 of the Convention.

II LEGAL ISSUES

(1) Recalling the importance of the protection of medical data to a person's enjoyment of the right to respect for private life, the Court had to examine whether the applicable domestic law had been formulated with sufficient safeguards against arbitrariness and for guaranteeing sensitive data protection.

(2) Whether the collection of personal medical data by a legal authority with the aim of protecting public health and the rights and freedoms of others constituted an interference in terms of the confidentiality of health data and was in breach of the right to respect for private life under Article 8(2) of the Convention.

III HOLDING (UNANIMOUSLY):

(1) The complaint under Article 8 of the Convention is admissible;

(2) There has been a violation of Article 8 of the Convention. As to the first legal issue, the Court could not find that the applicable Latvian law was formulated with sufficient precision and afforded adequate

216 In this regard, the Supreme Court considered that the Medical Treatment Law entitled the MADEKKI to examine the quality of medical care provided in medical institutions not only upon receiving a corresponding complaint from a patient, but also when a request for such examination had been submitted by a medical institution, which had an obligation to protect the interests of society so that, should any irregularities be found by the MADEKKI, they might be eliminated and their recurrence with respect to other patients avoided in the future.

legal protection against arbitrariness. Neither did it indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise;

(3) As to the second legal issue, the Court concludes that the interference with the applicant's right to respect for her private life was not in accordance with the law within the meaning of Article 8(2) of the Convention, resulting consequently in a violation of Article 8;

(4) The respondent State (Latvia) is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, the amount of EUR 11,000 plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage; and EUR 2,768 plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(5) The Court dismisses the remainder of the applicant's claim for just satisfaction.

IV REASONING

(a) Reasons why the Court found the application admissible

The Court declared the application admissible after it had considered and rejected the Government's objections regarding its inadmissibility and established that the application was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention.

– Submission of the parties

The Government's arguments:[217]

(1) The interference with the applicant's right to respect for her private life had been of an "insignificant level". The Government thus concluded that the MADEKKI had processed the applicant's data very carefully and had respected the applicable national data protection legislation.

(2) The interference had been in accordance with the law. The MADEKKI was authorised to check the quality of health care not only in situations where it had received a complaint from a patient, with the aim of protecting public interests, in order that, should any irregularities be found, they might be eliminated and their recurrence with respect to other patients avoided in the future.

(3) The legal provisions of various laws in force[218] entitled the MADEKKI to collect and process the applicant's sensitive data "in

217 *Ibid.,* paras. 34–39.

218 The Government referred to the Medical Treatment Law in combination with the relevant provisions of the statute of the MADEKKI and taking into account the exception to the

order to monitor the quality of medical care, as part of the provision of heath care services".

(4) The MADEKKI had collected the applicant's data in order to establish whether the treatment administered to her on 16 June 1997 had complied with the legislation in force at the material time. If any violations of the applicable legislation had been found, it would have helped to prevent similar situations from arising in the future. Thus, the purpose of collecting the applicant's personal data had been to protect public health and the rights and freedoms of others.

(5) The MADEKKI assessment had been ordered to determine whether the doctor at the Cēsis hospital, who had performed the tubal ligation, had committed a crime. The hospital had asked the MADEKKI to assess the treatment administered to the applicant.

The applicant's arguments:[219]

(1) The domestic law did not grant the MADEKKI the right to collect confidential medical data without receiving the patient's prior consent. Section 50 of the Medical Treatment Law left the decision whether or not to give information about patients to the discretion of the medical institutions in possession of such information.

(2) The statute of the MADEKKI, having been approved by the Cabinet of Ministers, which is an executive and not a legislative body, could not be considered "law" for the purposes of Article 8 (2) of the Convention.

(3) The only aim for which her personal data were collected by the MADEKKI had been to assist the Cēsis hospital in gathering evidence for use in the litigation concerning her sterilisation. The applicant disagreed with the submission of the Government that the information had been collected in order to establish the potential criminal liability of the doctor of the Cesis hospital.

(4) The applicant was critical of the proposition that the MADEKKI had collected her personal data to protect public health or the rights and freedoms of others, as no threat to anyone's health, rights or freedoms had been identified. Thus, the interference in the present case had not been necessary in a democratic society.

(5) The applicant also disagreed with the Government's submission that the interference with her right to respect for her private life had been insignificant. The collection of her personal data had undermined her confidence in the medical profession and in the health services in general.[220]

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prohibition on personal data processing under the Personal Data Protection Law in force at the time.

219 *L. H. v. Latvia,* paras. 40–46.

220 Here, the applicant referred to referred to the case of *I. v. Finland,* App. no. 20511/03, Judgment of 17 July 2008, para. 38.

(b) Reasons why the Court found a violation of Article 8 of the Convention

– Whether there has been an interference with the applicant's right –

The parties agreed that the applicant's medical data formed part of her private life and that the collection of such data by the MADEKKI constituted an interference with her right to respect for her private life. Therefore, there has been an interference with the applicant's right to respect for her private life. It remained to be determined whether the interference complied with the requirements of the second paragraph of Article 8 of the Convention.[221]

(c) Reasons why the Court found a violation of Article 8 of the Convention

– Whether the interference was justified –

As established earlier in its case-law, the Court referred to the interpretation given to the phrase "in accordance with the law".[222] Of particular relevance in the present case is the requirement for the impugned measure to have some basis in domestic law, considering that the domestic law must be formulated with sufficient precision and must afford adequate legal protection against arbitrariness. Accordingly, the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. The Court reiterated that, according to Article 19 of the Convention, its duty was to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In its view, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Against this background, the Court turned to the interpretation of section 11(5) of the Personal Data Protection Law given by the Senate of the Supreme Court[223].

The Court noted that the MADEKKI started to collect the applicant's medical data in 2004, seven years after her sterilisation and at a time when the applicant was involved in civil litigation with the Cēsis hospital. It held that this lengthy delay raised a number of questions, such as the one highlighted by the applicant, namely, whether data collection in 2004 could be deemed to have been "necessary for the purposes of medical treatment [or] the

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221 *L. H. v. Latvia,* para. 33.

222 *L. H. v. Latvia,* para. 47. Here, the Court referred to *S. and Marper v. the United Kingdom,* paras. 95–96.

223 *L. H. v. Latvia,* para. 49. Here, the Court referred to *García Ruiz v. Spain*, App. no. 30544/96, Judgment of 21 January 1999, para. 29.

provision or administration of heath care services" within the meaning of Section 11(5) of the Data Protection Law, if the actual health care services had been provided seven years earlier, in 1997. As it observed, such a broad interpretation of an exception to the general rule militating against the disclosure of personal data might not offer sufficient guarantees against the risk of abuse and arbitrariness.[224]

In this context, the Court found it noteworthy that the applicant had never been informed that the MADEKKI had collected and processed her personal data in order to carry out a general control of the quality of health care provided by the Cēsis hospital to patients in situations comparable to the one of the applicant. The hospital itself was never given any recommendations on how to improve the services provided by it. The only information that was received by the hospital pertained specifically to the actions of the doctor responsible for the applicant's treatment and that information was provided to the hospital at a time when there was an ongoing litigation between the applicant and the hospital.

The Court noted that the applicable legal norms described the competence of the MADEKKI in a very general fashion. The Senate of the Supreme Court did not explain which of its functions the MADEKKI had been carrying out or what public interest it had been pursuing when it issued a report on the legality of the applicant's treatment. Accordingly, the Supreme Court did not and could not examine the *proportionality* of the interference with the applicant's right to respect for her private life against any public interest, particularly since it came to the conclusion that such weighing had already been done by the legislator. Moreover, this took place against the background of domestic law, as in force at the relevant time, which did not provide for the right of the data subject to be informed that the MADEKKI would be processing his or her medical data before it started collecting the data. Thus, the MADEKKI was under no legal obligation to take decisions concerning the processing of medical data in such a way as to take the data subject's views into account, whether simply by asking for and potentially receiving the data subject's consent or by other means.

The Court did not accept the Government's suggestion that the MADEKKI had been collecting information concerning the applicant's medical history in order to determine the criminal liability of the doctor, who had performed the tubal ligation. Firstly, seven years after the event, the prosecution had certainly become time-barred (depending on the legal classification of the potentially criminal act, the statutory limit was most likely two years but certainly no more than five years). Secondly, neither the director of the Cēsis

224 *L. H. v. Latvia,* para. 50. Here, the Court referred to *S. and Marper v. the United Kingdom,* para. 99.

hospital nor the MADEKKI had the legal authority to determine, even on a preliminary basis, the criminal liability of private individuals.[225]

As for the Government's argument that the MADEKKI was authorised by the law to assist the hospital in litigation, the Court noted that the MADEKKI was part of the State administration structure, the *raison d'être* of which was to serve the interests of the general public within the limits of its competence. The Court observed that it had difficulties in understanding the legal basis for the argument of the Government, since, at least *prima facie*, none of the legal norms cited by the Government stated that providing independent expert advice in ongoing litigation was one of the MADDEKI's functions.[226] The Court noted that the MADEKKI appeared to have collected the applicant's medical data indiscriminately, without any prior assessment of whether the data collected would be "potentially decisive", "relevant" or "of importance" for achieving whatever aim might have been pursued by the MADEKKI's inquiry.[227] In this context, the Court noted, it became less relevant whether the staff of the MADEKKI had a legal duty to maintain the confidentiality of personal data.

The Court reiterated that the protection of personal data, not least medical data, was of fundamental importance to a person's enjoyment of the right to respect for his or her private life as guaranteed by Article 8 of the Convention. Respecting the *confidentiality* of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient, but also to preserve confidence in the medical profession and in the health services in general.[228] The Court observed that the relevance and sufficiency of the reasons for collecting information about the applicant not directly related to the procedures carried out at the Cēsis hospital in 1997 appeared not to have been examined at any stage of the domestic procedure.[229]

In the light of the above considerations, the Court could not find that the applicable Latvian law was formulated with sufficient precision and afforded adequate legal protection against arbitrariness. Neither did it indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. The Court accordingly concluded that the interference with the applicant's right to respect for her private life

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225 *L. H. v. Latvia,* para. 54.

226 *Ibid.,* para. 55.

227 *Ibid.,* para. 58. The Court also referred to *L. L. v. France*, para. 46; and *M. S. v. Sweden,* paras. 38, 42 and 43.

228 *L. H. v. Latvia*, para. 56. The Court made a reference to *Z v. Finland*, App. no. 22009/93, Judgment of 25 February 1997, para. 95; and *Varapnickaitė-Mažyliene v. Lithuania*, App. no. 20376/05, Judgment of 17 January 2012, para. 44.

229 See *Z v. Finland*, para. 110.

was not in accordance with the law within the meaning of Article 8(2) of the Convention. Consequently, the Court concluded that there had been a violation of Article 8.

(d) Decision on just satisfaction

In the light of the complexity and the scope of the domestic proceedings, the Court, having taken into account the documents in its possession, found the sum claimed in that respect reasonable as to quantum. The Court awarded an amount of EUR 11,000 plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage. Also, the Court considered it reasonable to award the sum of EUR 2,768, covering costs under all heads, which represented the requested sum, less EUR 850 already paid to the applicant's lawyer in legal aid. The Court dismissed the remainder of the applicant's claim for just satisfaction.

CASE OF SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY V. FINLAND
(Final Judgment of 27 June 2017)

CASE BRIEF

I FACTS

Since 1994, the first applicant company, Satakunnan Markkinapörssi Oy, collected data from the Finnish tax authorities for the purpose of publishing information about natural persons' taxable income and assets in the *Veropörssi* newspaper. Several other publishing and media companies also publish such data which, pursuant to Finnish law, are accessible to the public. The data published comprised the surnames and forenames of approximately 1.2 million natural persons, whose annual taxable income exceeded certain thresholds, mainly from 60,000 to 80,000 Finnish marks (approximately EUR 10,000 to 13,500), as well as the amount, to the nearest EUR 100, of their earned and unearned income and taxable net assets. When published in the newspaper, the data were set out in the form of an alphabetical list and organised according to municipality and income bracket.

The first applicant company worked in cooperation with the second applicant company, Satamedia Oy, and both were owned by the same shareholders. In 2003, the first applicant company started to transfer personal data published in *Veropörssi*, in the form of CD-ROM discs, to the second applicant company which, together with a mobile telephone operator, started a text-

messaging service (SMS service). By sending a person's name to a service number, taxation information could be obtained concerning that person, on the requesting person's mobile telephone, if information was available in the database or register created by the second applicant company. This database was created using personal data already published in the newspaper and transferred in the form of CD-ROM discs to the second applicant company. As of 2006, the second applicant company also published *Veropörssi*.

In September 2000 and November 2001, the applicant companies ordered taxation data from the Finnish National Board of Taxation. Following the first order, the Board requested an opinion from the Data Protection Ombudsman, based on which the Board invited the applicant companies to provide further information regarding their request and indicating that the data could not be disclosed if *Veropörssi* continued to be published in its usual form. The applicant companies subsequently cancelled their data request and paid people to collect taxation data manually at the local tax offices.

In 2003, the Office of the Data Protection Ombudsman (DPO), an independent authority affiliated to the Finnish Ministry of Justice, contacted the companies and informed them that they could keep collecting the data but could no longer publish them. The companies refused to comply, arguing that the request was in violation of their freedom of expression. Consequently, the DPO requested the Data Protection Board to prevent the companies from publicly processing and publishing taxation information of individuals, alleging that such actions were in violation of the country's Personal Data Act. The Data Protection Board dismissed the request and ruled that the publication of information was a rightful derogation from the Act based on the companies' journalistic right. Thereafter, the DPO appealed this decision with the Helsinki Administrative Court, which dismissed it in September 2005.

In 2007, the DPO filed an appeal with the Supreme Administrative Court. That court requested a preliminary ruling from the Court of Justice of the European Communities (which became the CJEU in 2009). The Court of Justice ruled that, under Directive 95/46/EC, processing and publishing taxation information could be classified as "journalistic activities if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit them". Subsequently, the Supreme Administrative Court held that after balancing the right to freedom of expression against the right to privacy, the publication of the data could not be considered part of the companies' journalist activity because "the public interest did not require such publication of personal data to the extent seen in the present case".

Pursuant to its ruling, in 2009, the Supreme Administrative Court of Finland requested of the Data Protection Board to forbid the companies from processing

extensive taxation data for publishing purposes on the grounds that, in light of balancing the right to freedom of expression against the right to privacy, public interest did not require of the companies to process and publish such substantial taxation information. The companies shut down the SMS service and only published the information in the magazine until the fall of 2009.

The companies then appealed the Data Protection Board's directives with the Helsinki Administrative Court. The appeal was dismissed. In 2012, the Supreme Administrative Court again upheld the decision banning the companies from publishing the taxation information. The editor-in-chief of *Veropörssi* lodged an application with the Court in 2010, complaining that the impugned decision of the Supreme Administrative Court violated his right to freedom of expression. On 19 November 2013, the application was declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention.

In 2012, the companies filed an application with the ECtHR, among other grounds, alleging that the administrative closure of their publication violated their right to freedom of expression.

II LEGAL ISSUES

(1) Whether the administrative closure of the applicants' publication on taxation data violated their right to freedom of expression and, thus, Article 10 of the Convention.

(2) Whether in the circumstances of the case, the right to privacy under Article 8 of the Convention was engaged given the publicly accessible nature of the taxation data processed and published by the applicant companies.

(3) Whether the interference with the applicant companies' right to freedom of expression was "necessary in a democratic society" and whether, in answering this question, the domestic courts struck a fair balance between these two rights in the circumstances of a case such as this one.

(4) Whether the length of the domestic proceedings had been excessive, in breach of Article 6(1) of the Convention.

III HOLDING

(1) There has been no violation of Article 10 of the Convention (by fifteen votes to two);

(2) There has been a violation of Article 6(1) of the Convention (by fifteen votes to two);

(3) The respondent State is to pay the applicant companies, within three months, EUR 9,500, inclusive of any tax that may be chargeable, in respect of costs and expenses (by fourteen votes to three);

(4) The remainder of the applicant companies' claim for just satisfaction is dismissed (by fifteen votes to two).

IV MAJORITY REASONING

(a) Reasons why the Court declared the application admissible

The Government raised two preliminary objections relating to the applicant companies' alleged failure to lodge their complaints *within the six-month time-limit* and to their *lack of victim status.* After considering the circumstances of the case, the Court dismissed both of the Government's preliminary objections and decided to consider the applicants' complaints under Articles 6(1) and 10 of the Convention.

(b) Preliminary remarks on the scope and context of the Court's assessment

The Court noted that the case was complex and unusual to the extent that the taxation data at issue were publicly accessible in Finland. Furthermore, as emphasised by the applicant companies, they were not alone amongst media outlets in Finland in collecting, processing and publishing taxation data, such as the data that appeared in *Veropörssi*. Their publication differed from those of the other media outlets by virtue of the manner and the extent of the data published.[230] In addition, only a very small number of Council of Europe Member States provide for public access to taxation data, a fact which raised issues regarding the margin of appreciation which Finland enjoys when providing and regulating public access to such data and reconciling that access with the requirements of data protection rules and the right to freedom of expression of the press.[231]

Given this context and the fact that at the heart of the case lied the question whether the correct balance had been struck between the right to freedom of expression and the right to privacy as embodied in domestic data protection and access to information legislation, the Court outlined some of the general principles deriving from its case-law on Article 10 and the freedom of the press, on the one hand, and the right to privacy under Article 8 of the Convention in the particular context of data protection, on the other, bearing

230 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 120.

231 *Ibid.,* para. 121.

in mind that the balance to be struck by national authorities between those two rights must seek to retain the essence of both.[232]

(c) Article 10 Guarantees Press Freedom: the Court's Explanation

The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10(2) of the Convention, it is applicable not only to "information" or "ideas"' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society".[233]

The Court noted that it has repeatedly recognised in its case-law the vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas. The role of the press is important in imparting such information and ideas, but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as "public watchdog".[234] Furthermore, the Court has consistently held that it is not for it, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case. Finally, it is well-established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.[235]

As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly.[236] Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its task is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. The task of imparting information necessarily includes, however, "duties and responsibilities", as well as limits which the press must

232 *Ibid.,* para. 123. The Court also referred to *Delfi AS v. Estonia*, para. 110.

233 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 124.

234 *Ibid.,* para. 126. Here the Court referred to *Magyar Helsinki Bizottság v. Hungary*, para. 165.

235 *Ibid.,* paras. 126–128. The Court also invoked *Magyar Helsinki Bizottság v. Hungary,* para. 130.

236 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 124. The Court also referred to *Von Hannover v. Germany (No. 2)*, para. 101; *Couderc and Hachette Filipacchi Associés v. France*, para. 88; and *Bédat v. Switzerland*, App. no. 56925/08, Judgment of 29 March 2016, para. 48.

impose on itself spontaneously. As already noted by the Court, not only does the press have the task of imparting such information and ideas, but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as "public watchdog".[237] Also, it is well established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.[238]

(d) Article 8 Guarantees the Right to Data Protection: the Court's Explanation

As regards whether, in the circumstances of the present case, the right to privacy under Article 8 of the Convention is engaged given the publicly accessible nature of the taxation data processed and published by the applicant companies, the Court has constantly reiterated that the concept of "private life" is a broad term not susceptible to exhaustive definition.[239] The vast majority of cases in which the Court has had to examine the balancing by domestic authorities of press freedom under Article 10 and the right to privacy under Article 8 of the Convention regarded alleged infringements of the right to privacy of a named individual or individuals as a result of the publication of particular material.[240] In the particular context of data protection, the Court has, on a number of occasions referred to the Data Protection Convention which itself underpins the Data Protection Directive applied by the domestic courts in the present case.[241]

The fact that information is already in the public domain will not necessarily remove the protection of Article 8 of the Convention, as argued in the first *Von Hannover v. Germany* case,[242] concerning the publication of photographs taken in public places of a known person who did not perform any official function. In that case, the Court found that the interest in publication of that information had to be weighed against privacy considerations, even though the person's public appearance could be assimilated to "public information".[243]

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237 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 126. The Court referred to *Magyar Helsinki Bizottság v. Hungary*, para. 165.

238 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, paras. 125–128.

239 *Ibid.,* para. 129. The Court referred to *S. and Marper v. the United Kingdom*, para. 66; and *Vukota-Bojić v. Switzerland*, para. 52.

240 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 132. The Court referred to *Flinkkilä and Others v. Finland*, App. no. 25576/04, Judgment of 6 April 2010; and *Ristamäki and Korvola v. Finland*, App. no. 66456/09, Judgment of 29 October 2013.

241 That Convention defines personal data in Article 2 as "any information relating to an identified or identifiable individual", and the Court has provided an interpretation of the notion of "private life" in the context of storage of personal data when discussing the applicability of Article 8.

242 *Von Hannover v. Germany*, App. no. 59320/00, Judgment of 24 June 2004.

243 Similarly, in *Magyar Helsinki Bizottság v. Hungary*, central to the Court's dismissal of privacy concerns was not the public nature of the information to which the applicant

The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this provision. Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged. It follows from well-established case-law that where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private life considerations arise.[244]

In the light of the foregoing considerations and the Court's existing case-law on Article 8 of the Convention, it appears that the data collected, processed and published by the applicant companies in *Veropörssi*, providing details of the taxable earned and unearned income as well as taxable net assets, clearly concerned the private life of those individuals, notwithstanding the fact that, pursuant to Finnish law, that data could be accessed, in accordance with certain rules, by the public.[245]

(e) Reasons why the Court dismissed the complaint under Article 10

– Whether there has been an interference with the applicant's right –

The applicant companies complained that: (a) their right to freedom of expression protected by paragraph 1 of Article 10 of the Convention had been interfered with in a manner which was not justified under its second paragraph. The collection of taxation information was not illegal as such and the information collected and published was in the public domain; and (b) individual privacy rights had not been not violated.

The Court noted that, by virtue of the decisions of the domestic data protection authorities and courts, the first applicant company was prohibited from processing taxation data in the manner and to the extent that had been

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sought access, which is a factor to be considered in any balancing exercise, but rather the fact that the domestic authorities had made no assessment whatsoever of the potential public-interest character of the information sought by the applicant in that case.

244 See also *e.g. M. N. and Others v. San Marino*, App. no. 28005/12, Judgment of 7 July 2015, paras. 52–53; *Rotaru v. Romania*, App. no. 28341/95, Judgment of 4 May 2000, paras. 43–44; *Uzun v. Germany,* paras. 44–46.

245 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 138.

the case in 2002 and from forwarding that information to an SMS service. The domestic courts found that the collection of personal data and their processing in the background file of the first applicant company could not as such be regarded as contrary to the data protection rules, provided, *inter alia*, that the data had been protected properly. However, considering the manner and the extent to which the personal data in the background file had subsequently been published in *Veropörssi*, the first applicant company, which was found not to be able to rely on the journalistic purposes derogation, had processed personal data concerning natural persons in violation of the Personal Data Act. The second applicant company was prohibited from collecting, storing or forwarding to an SMS service any data received from the first applicant company's database and published in *Veropörssi*.

Consequently, the Court found that the Data Protection Board's decision, as upheld by the national courts, entailed an interference with the applicant companies' right to impart information as guaranteed by Article 10 of the Convention.

(f) Reasons why the Court dismissed the complaint under Article 10

– Whether the interference was justified –

In the light of Article 10(2), such an interference with the applicant companies' right to freedom of expression must be "prescribed by law", pursue one or more legitimate aims and be "necessary in a democratic society". In the present case, the applicant companies and the Government differed as to whether the interference with the applicant company's freedom of expression was "prescribed by law".[246]

Prescribed by law. The Court considered that the expression "prescribed by law" in Article 10(2) not only required that the impugned measure should have a legal basis in domestic law, but also referred to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.[247] As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10(2) unless it is formulated with sufficient precision to enable a person to regulate his or her conduct.

The interpretation of the law is vested in the national courts and the role of adjudication vested in the national courts is precisely to dissipate such interpretational doubts as may remain. The Court's power to review compliance

246 *Ibid,* para. 146.

247 *Ibid,* para. 142. The Court also invoked *Delfi AS v. Estonia,* para. 120.

with domestic law is thus limited, as it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. Moreover, the level of precision required of domestic legislation depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.[248] In the present case, the applicant companies and the Government disagreed on whether the interference with the applicant company's freedom of expression was "prescribed by law".

Regarding the foreseeability of the domestic legislation and its interpretation and application by the domestic courts, in the absence of a provision in the domestic legislation explicitly regulating the quantity of data that could be published and in view of the fact that several media outlets in Finland were also engaged in publication of similar taxation data to some extent, the question arose whether the applicant companies could be considered to have foreseen that their specific publishing activities would fall foul of the existing legislation, bearing in mind in this connection the existence of the journalistic purposes derogation.

As the Court observed, the terms of the relevant data protection legislation and the nature and scope of the journalistic derogation on which the applicant companies sought to rely were sufficiently foreseeable and those provisions were applied in a sufficiently foreseeable manner following the interpretative guidance provided to the Finnish court by the CJEU.[249] The Personal Data Act transposed the Data Protection Directive into Finnish law. It seemed clear for the national competent authorities to arrive at the conclusion, as they did in this case, that a database established for journalistic purposes could not be disseminated as such. The quantity and form of the data published could not exceed the scope of the derogation and the derogation, by its nature, had to be restrictively interpreted, as the CJEU had clearly indicated.

Even if the applicant companies' case was the first of its kind under the Personal Data Act, that would not render the domestic courts' interpretation and application of the journalistic derogation arbitrary or unpredictable, nor would the fact that the Supreme Administrative Court sought guidance from the CJEU on the interpretation of the derogation in Article 9 of the Data Protection Directive. Indeed, as regards the latter, the Court has regularly emphasised the importance, for the protection of fundamental rights in the EU, of the judicial dialogue conducted between the domestic courts of EU Member States and the CJEU in the form of references from the former

248 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 144. The Court also referred to *Kudrevičius and Others v. Lithuania*, App. no. 37553/05, Judgment of 15 October 2015, para. 110.

249 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 149.

for preliminary rulings by the latter.[250] Moreover, the applicant companies were media professionals and, as such, they should have been aware of the possibility that the mass collection of data and its wholesale dissemination – pertaining to about one third of Finnish taxpayers or 1.2 million people, a number 10 to 20 times greater than that covered by any other media organisation at the time – might not be considered as processing "solely" for journalistic purposes under the relevant provisions of Finnish and EU law.[251]

In the instant case, following their requests for data from the National Board of Taxation in 2000 and 2001, the applicant companies were requested by the Data Protection Ombudsman to provide further information regarding those requests and were told that the data could not be disclosed if *Veropörssi* continued to be published in its usual form. Instead of complying with the Ombudsman's request for more information, the applicant companies circumvented the usual route for journalists to access the taxation data sought and organised for the latter to be collected manually at the local tax offices. Furthermore, the updated version of the Guidelines for Journalists indicated clearly that the principles concerning the protection of an individual also applied to the use of information contained in public documents or other public sources and that the mere fact that information was accessible to the public did not always mean that it was freely publishable. These guidelines, which were intended to ensure self-regulation by Finnish journalists and publishers, must have been familiar to the applicant companies. In light of the above considerations, the Court concluded that the impugned interference with the applicant companies' right to freedom of expression was "prescribed by law".

Legitimate aim. As the Court noted, the parties did not in substance dispute that the interference with the applicant companies' freedom of expression could be regarded as pursuing the legitimate aim of protecting "the reputation and rights of others". However, the applicant companies argued that while the need to protect against violations of privacy might be a relevant consideration, it was one which the Finnish legislator had already taken into account, assessed and accepted when adopting the Personal Data Act. In their view, the alleged need to protect privacy in the instant case was abstract and hypothetical. Any threat to privacy had been practically non-existent and, in any event, the case was not at all about the privacy of isolated individuals.[252]

The Court further observed that, contrary to the suggestions of the applicant companies, it emerged clearly from the case file that the Data Protection

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250 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* App. no. 45036/98, Judgment of 30 June 2005, para. 164; *Avotiņš v. Latvia,* App. no. 17502/07, Judgment of 23 May 2016, paras. 105 and 109.

251 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para. 151.

252 *Ibid.,* paras. 155–156.

Ombudsman had acted on the basis of concrete complaints from individuals claiming that the publication of taxation data in *Veropörssi* had infringed their right to privacy. It was an undisputed fact that a very large group of natural persons, who were taxpayers in Finland, had been directly targeted by the applicant companies' publishing practice. It is arguable that all Finnish taxpayers were affected, directly or indirectly, by the applicant companies' publication since their taxable income could be estimated by readers by virtue of their inclusion in or exclusion from the lists published in *Veropörssi*.

The applicant companies' argument failed to appreciate the nature and scope of the duties of the domestic data protection authorities pursuant to, *inter alia*, Section 44 of the Personal Data Act and the corresponding provisions of the Data Protection Directive. As regards the latter, it was noteworthy that the CJEU has held that the guarantee of the independence of national supervisory authorities was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. In order to guarantee that protection, the national supervisory authorities must, in particular, ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data. The protection of privacy was thus at the heart of the data protection legislation for which these authorities were mandated to ensure respect.[253]

In this respect, the Court clearly made a direct reference to EU law, by observing that, in the light of the above considerations and taking into account the aims of the Data Protection Convention, reflected in Directive 95/46 and, more recently, in Regulation 2016/79, it was clear that the interference with the applicant companies' right to freedom of expression pursued the legitimate aim of protecting "the reputation or rights of others", within the meaning of Article 10(2) of the Convention.[254]

Necessary in a democratic society – the margin of appreciation and balancing of rights. The core question in the instant case was whether the interference with the applicant companies' right to freedom of expression had been "necessary in a democratic society" and whether, in answering this question, the domestic courts had struck a fair balance between that right and the right to respect for private life.

The Court considered it useful to reiterate the criteria for balancing these two rights in the circumstances of a case such as the present one.

The Court noted that the choice of the means calculated to secure compliance with Article 8 of the Convention was in principle a matter that fell

253 *Ibid.,* para. 158.

254 *Ibid.,* para. 159.

within the Contracting States' margin of appreciation, whether the obligations on the State were positive or negative. Likewise, under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court reiterated that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. As indicated previously, these rights deserve equal respect and accordingly, the margin of appreciation should in principle be the same in both situations.

According to the Court's established case-law, the test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. The margin of appreciation left to the national authorities in assessing whether such a need exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. As indicated above, when exercising its supervisory function, the Court's task is not to take the place of the national courts but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.[255]

The Court had already laid down the relevant principles which must guide its assessment – and, more importantly, that of domestic courts – of necessity. It has thus identified a number of criteria in the context of balancing the competing rights. The relevant criteria have thus far been defined as: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where it arises, the circumstances in which photographs were taken. Where it examines an application lodged under Article 10, the Court must also examine the way in which the information was obtained and its veracity,

255 *Ibid.,* para. 164.

and the gravity of the penalty imposed on the journalists or publishers.[256] Therefore, the Court considered that the criteria thus defined may be transposed to the present case, albeit certain criteria may have more or less relevance given the particular circumstances of the present case, which concerned the mass collection, processing and publication of data, which were publicly accessible in accordance with certain rules and which related to a large number of natural persons in the respondent State.

In the light of the aforementioned considerations, the Court considered that, in assessing the circumstances submitted for their appreciation, the competent domestic authorities and, in particular, the Supreme Administrative Court had given due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. In so doing, in particular, the Supreme Administrative Court analysed the relevant Convention and CJEU case-law and carefully applied the ECtHR's case-law to the facts of the instant case. The Court considered that the Supreme Administrative Court had attached particular weight to its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The Court discerned no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them.[257]

The Court was satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the authorities of the respondent State had acted within their margin of appreciation in striking a fair balance between freedom of expression and the right to privacy embodied in data protection legislation. The Court therefore concluded that there had been no violation of Article 10 of the Convention.

(g) Reasons why the Court found a violation of Article 6(1) of the Convention

As regards the alleged violation of Article 6(1) of the Convention, the Court noted that the impugned proceedings before the domestic authorities and courts had lasted over six years and six months at two levels of jurisdiction, of which both levels twice. There had not been any particularly long period of inactivity on the part of the authorities and domestic courts.

256 *Ibid.,* para. 165.

257 *Ibid.,* para. 198. The Court also referred to *Von Hannover v. Germany (No. 2),* para. 107.

The Court opined that the case was legally complex, a fact demonstrated by a paucity of jurisprudence at the Finnish level, the need to refer questions relating to the interpretation of EU law to the CJEU and the very fact that the case was referred to the Grand Chamber of the ECtHR.[258] However, it noted that it could not be said that the legal complexity of the case in itself justified the entire length of the proceedings. Some of this complexity was, in addition, caused by the fact that the case had been referred back to the Data Protection Board for a new examination. According to the Court, the excessive total length of the proceedings should be attributed essentially to the fact that the case had been examined twice by each level of jurisdiction.

Therefore, having examined all the material submitted to it, the Court considered that, even taking into account the complexity of the case from a legal point of view, the length of the proceedings as a whole was excessive and failed to meet the reasonable time requirement. It concluded that there had been a violation of Article 6(1) of the Convention on account of the length of the proceedings.

(h) Decision on just satisfaction

The Court held that the respondent State was to pay the applicant companies, within three months, EUR 9,500 inclusive of any tax that may be chargeable, in respect of costs and expenses. The Court dismissed the remainder of the applicant companies' claim for just satisfaction.

258 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* para. 212.

III LIST OF ECTHR CASES CITED IN THE CHAPTER

Amann v. Switzerland, 27798/95 (2000)

Antoneta Tudor v. Romania, 23445/04 (2013)

Aycaguer v. France, 8806/12 (2017)

Bărbulescu v. Romania, 61496/08 (2016)

B. B. v. France, 5335/06 (2009)

Bédat v. Switzerland, 56925/08 (2016)

Brunet v. France, 21010/10 (2014)

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, 45036/98 (2005)

Bureau of Investigative Journalism and Alice Ross v. the United Kingdom, 62322/14 (2015)

Copland v. the United Kingdom, 62617/00 (2007)

Couderc and Hachette Filipacchi Associés v. France, 40454/07 (2015)

Delfi AS v. Estonia, 64569/09 (2015)

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Flinkkilä and Others v. Finland, 25576/04 (2010)

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Godelli v. Italy, 33783/09 (2012)

Haralambie v. Romania, 21737/03 (2009)

I. v. Finland, 20511/03 (2008)

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J. P. D. v. France, 55432/10 (2014)

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Khelili v. Switzerland, 16188/07 (2011)

Köpke v. Germany, 420/07 (2010)

K. U. v. Finland, 2872/02 (2008)

Kudrevičius and Others v. Lithuania, 37553/05 (2015)

Leander v. Sweden, 9248/81 (1987)

L. H. v. Latvia, 52019/07 (2014)

L. L. v. France, 7508/02 (2006)

Magyar Helsinki Bizottság v. Hungary, 18030/11 (2016)

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Mitkus v. Latvia, 7259/03 (2012)

M. K. v. France, 19522/09 (2013)

M. M. v. the United Kingdom, 24029/07 (2012)

M. N. and Others v. San Marino, 28005/12 (2015)

M. S. v. Sweden, 20837/92 (1997)

Odièvre v. France, 42326/98 (2003)

Panteleyenko v. Ukraine, 11901/02 (2006)

Peck v. the United Kingdom, 44647/98 (2003)

Perinçek v. Switzerland, 27510/08, (2015)

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R. E. v. the United Kingdom, 62498/11 (2015)

Ristamäki and Korvola v. Finland, 66456/09 (2013)

Roche v. the United Kingdom, 32555/96 (2005)

Roman Zakharov v. Russia, 47143/06 (2015)

Rotaru v. Romania, 28341/95 (2000)

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, 931/13 (2017)

S. and Marper v. the United Kingdom, 30562/04 and 30566/04 (2008)

Segerstedt-Wiberg and Others v. Sweden, 62332/00 (2006)

Sõro v. Estonia, 22588/08 (2015)

Szabó and Vissy v. Hungary, 37138/14 (2016)

Taylor-Sabori v. the United Kingdom, 47114/99 (2002)

Turek v. Slovakia, 57986/00 (2006)

Uzun v. Germany, 35623/05 (2010)

Varapnickaitė-Mažylienė v. Lithuania, 20376/05 (2012)

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Von Hannover v. Germany (No. 2), 40660/08 and 60641/08 (2012)

Vukota-Bojić v. Switzerland, 61838/10 (2016)

Z v. Finland, 22009/93 (1997)

Chapter 4: RIGHT OF ACCESS TO INFORMATION UNDER ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 10
Freedom of Expression

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

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

I INTRODUCTION

This Chapter deals with the right of access to information held by public authorities, protected under Article 10 of the Convention. It starts with general observations about the idea of freedom to seek and receive information, which generates the positive duty of the state authorities to make the information possessed by them accessible. The central part of the Chapter outlines the concept of the right of access to information, together with the criteria for establishing whether a refusal to provide the information can be regarded as an "interference" with the right of access to information and the standards for establishing whether an "interference" was justified. The Chapter illustrates the reasoning of the Court and the principles upon which it has construed the right of access to information. The Chapter also provides readers with

short comments, a summary and case briefs of *Magyar Helsinki Bizottság v. Hungary*[259] and *Youth Initiative for Human Rights v. Serbia*.[260]

GENERAL OBSERVATIONS

Access to state-held information is essential in a democratic society since it allows citizens to form a critical opinion on the society in which they live and supports their informed participation in democracy. If information is withheld or partial, not only may that democratic participation be undermined, but it may also generate suspicions of the government and undermine public trust.[261] Therefore, access to information is closely linked to "the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority", enshrined in Article 10(1) of the European Convention on Human Rights.

Today, a broad consensus exists in Europe (and beyond) on the need to recognise the individual right of access to state-held information in order to assist the public in forming an opinion on matters of general interest. The great majority of the Contracting States of the European Convention on Human Rights recognises a statutory right of access to information and/or official documents held by public authorities as a self-standing right aimed at reinforcing transparency in the conduct of public affairs generally.[262]

A high degree of consensus has also emerged at the international level. Although still not in force, the adoption of the Council of Europe Convention on Access to Official Documents in 2009, the first binding international legal instrument to recognise a general right of access to official documents held by public authorities, illustrates this point well.[263]

The right to seek information is expressly guaranteed by Article 19 of the International Covenant on Civil and Political Rights and by Article 19 of the UN Universal Declaration on Human Rights. Article 42 of the European Union's Charter of Fundamental Rights, as well as Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001, guarantee citizens a right of access to documents held by

259 *Magyar Helsinki Bizottság v. Hungary,* App. no. 18030/11, Judgment of 8 November 2016.

260 *Youth Initiative for Human Rights v. Serbia,* App. no. 48135/06, Judgment of 25 June 213.

261 Frederick Schauer, *Free Speech: A Philosophical Inquiry*, Cambridge, Cambridge University Press, 1982.

262 *Magyar Helsinki Bizottság v. Hungary,* para. 139.

263 This Convention will come into force when it is ratified by 10 countries. Among the countries targeted in the Study, only Bosnia and Herzegovina and Montenegro have ratified the Convention. Macedonia and Serbia have both signed it but not ratified it yet.

the EU institutions. In the view of the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, the right to seek and receive information is an essential element of the right to freedom of expression, which encompasses the general right of the public to have access to information of public interest, the right of individuals to seek information concerning themselves that may affect their individual rights and the right of the media to access information.[264] Finally, it is important to mention that the Inter-American Court of Human Rights has interpreted Article 13 of the American Convention on Human Rights as to include the protection of the right of access to state-held information.[265]

Unlike the International Covenant on Civil and Political Rights and the European Union's Charter of Fundamental Rights, Article 10 of the Convention does not specify that it encompasses a freedom to *seek* information. The former European Commission of Human Rights noted that, although Article 10 of the Convention did not mention freedom to seek information, it could not be ruled out that such a freedom was included, by implication, among those protected by that article and that, in certain circumstances, Article 10 included the right of access to documents which were not generally accessible.[266] The Commission maintained that it was necessary to leave the possibility of development to judicial interpretation of Article 10. According to the Court, in certain types of situations and subject to specific conditions, there may be weighty arguments in favour of reading into this provision an individual right of access to state-held information and an obligation on the State to provide such information.[267] In sum, the concept of the freedom to seek information, *e.g.* the right of access to information under Article 10 of the Convention is a judicial construction.

RIGHT OF ACCESS TO INFORMATION: SCOPE AND PROCEEDINGS BEFORE THE COURT

1. Judicial Construction of the Right of Access to Information

The Court found in a series of judgments that there had been an interference with a right protected by Article 10(1) in situations where the applicant was deemed to have had an established right to the information under domestic law (in particular based on a final court decision), but where the authorities

264 *Magyar Helsinki Bizottság v. Hungary,* para. 142.
265 *Claude Reyes et al. v. Chile*, Judgment of 19 September, 2006, Series C No. 151.
266 *Magyar Helsinki Bizottság v. Hungary,* para. 136.
267 *Ibid*., para. 137.

had failed to give effect to that right.[268] For a long time, the standard jurisprudential position on the matter was the one set out by the Court in the *Leander* case:

> "[The] right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."[269]

However, in *Magyar Helsinki Bizottság v. Hungary*, the Court clarified the *Leander* holding and for the first time explicitly ruled that, under Article 10 of the Convention (independently of whether domestic law recognised the right of access to information or not), the States had a positive duty to disclose the requested information provided that certain conditions were met.[270] In order to determine whether and to what extent the right of access to state-held information can be viewed as falling within the scope of "freedom of expression" under Article 10 of the Convention, the Court took into account the following principles:

- As an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 1969. In accordance with the Vienna Convention, the Court is required to establish the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn.
- Regard must be given to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must also be read as a whole, and interpreted in such a way so as to promote internal consistency and harmony between its various provisions.
- The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be

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268 See *e.g. Sdruženi Jihočeské Matky v. the Czech Republic*, App. no. 19101/03, Judgment of 10 July 2006; *Kenedi v. Hungary*, Appl. no. 31475/05, Judgment of 26 August 2009; *Roşiianu v. Romania*, App. no. 27329/06, Judgment of 24 June 2014; *Guseva v. Bulgaria*. App. no. 6987/07, Judgment of 17 February 2015; *Youth Initiative for Human Rights v. Serbia, op. cit.*

269 *Leander v. Sweden*, App. no. 9248/81, Judgment of 26 March 1987, para. 74.

270 *Magyar Helsinki Bizottság v. Hungary,* para. 156.

interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.

- To hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention.
- Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties – the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.
- The consensus emerging from specialised international instruments and from the practice of the Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic-law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision.
- Recourse may be had to supplementary means of interpretation, including the preparatory work (*travaux préparatoires*) of the treaty, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable.[271]

2. Scope of the Right of Access to Information

In the light of the above-mentioned principles, the Court has ruled:

(1) The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.

(2) The right to receive information cannot, however, be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.

271 *Ibid*., paras. 118–148.

(3) Although Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual, such a right or obligation may arise in the following two cases:

(a) *where disclosure of the information has been imposed by a judicial order* [of a domestic court] *which has gained legal force*; and,

(b) *in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right*.[272]

(4) Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances.[273]

3. Proceedings before the Court

The proceedings before the Court, instituted with regard to the right of access to information held by the state authorities, comprise two stages. In the first stage, the Court decides whether the application falls within the scope of Article 10(1) of the Convention. If it does, then, in the second stage, the Court decides whether the State has complied with the requirements of Article 10.

If the Court finds that the complaint regarding the right of access to information falls within the scope of Article 10(1) of the Convention, and finds that there has been an interference with the right protected by Article 10(1), it must then decide whether the case concerns the State's negative or positive obligation.

If the Court finds that the case concerns a negative obligation and that there has been an interference with the right protected by Article 10(1), it has to examine whether the State's interference was justified under Article 10(2) of the Convention, *e.g.* whether it was:

(d) in accordance with the law;

(e) in pursuit of a legitimate aim; and,

(f) necessary in a democratic society.

272 *Ibid*., para. 156.

273 *Ibid*., para. 157.

If the Court finds that the case concerns positive obligations, it must consider "whether the importance of the interest at stake requires the imposition of positive obligation sought by the applicant, having regard to the fair balance which must be struck between the competing interests in the case".[274]

CRITERIA FOR DETERMINING WHETHER A STATE HAD INTERFERED WITH AN APPLICANT'S RIGHT OF ACCESS TO INFORMATION

The Convention does not recognise a stand-alone right of access to information; nor does it impose a duty on States to proactively release public interest information.[275] Rather, in order to determine in each particular case whether the information is instrumental for the individual's exercise of his or her right to freedom of expression, and whether its denial constitutes an interference with that right, the following criteria have to be considered.

1. Purpose of the Information Request

The purpose of the person in requesting access to the information held by a public authority must be to enable his or her exercise of the freedom to "receive and impart information and ideas" to others. Thus, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate. In order for Article 10 to come into play, it must be determined whether the information sought was in fact necessary for the exercise of freedom of expression. Obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression, including the freedom "to receive and impart information and ideas", in a manner consistent with such "duties and responsibilities" as may follow from Article 10(2).[276]

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274 Harris, D. J., et al., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 3rd Edition, Oxford, Oxford University Press, 2014, p. 524.

275 *Ibid*, pp. 620–621; see also Sejal Parmar, "Affirming the Right of Access to Information in Europe: The Grand Chamber Decision in Magyar Helsinki Bizottság v. Hungary", (2017) *1 European Human Rights Law Review*, pp. 68–74.

276 *Magyar Helsinki Bizottság v. Hungary*, paras. 158–159.

2. Nature of the Information Sought

The information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.[277]

The definition of what might constitute a subject of public interest will depend on the circumstances of each case. Public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. Public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to establish whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears.[278]

3. Role of the Applicant

An important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog", the term which, according to the Court's case law, encompasses the press, NGOs, civil society, "academic researchers",

277 *Ibid*., para. 161.

278 *Ibid*., para. 162. The Court previously found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was "factual information concerning the use of electronic surveillance measures" (*Youth Initiative for Human Rights,* para. 24), "information about a constitutional complaint" and "on a matter of public importance" (*Társaság a Szabadságjogokért v. Hungary*, App. no. 37374/05, Judgment of 15 April 2009, paras. 37–38), "original documentary sources for legitimate historical research" (*Kenedi v. Hungary*¸ para. 43), and decisions concerning real property transaction commissions (*Case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land– und forstwirtschaftlichen Grundbesitzes v. Austria*, App. no. 39534/07, Judgment of 28 November 2013, para. 42), attaching weighty consideration to the presence of particular categories of information considered to be in the public interest. *Ibid*., para. 160.

"authors of literature on matters of public concern" and "bloggers and popular users of the social media".

The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court:

> "The duty of the press is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"."[279]

The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press.[280] Given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned.[281] In this sense, a high level of protection under Article 10 is also given to academic researchers and authors of literature on matters of public concern.[282]

4. Ready and Available Information

The fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by Article 10(1). However, the Court dismissed a domestic authority's reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty was generated by the authority's own practice.[283]

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279 *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, Judgment of 20 May 1999.

280 *Magyar Helsinki Bizottság v. Hungary*, para. 166.

281 *Ibid*., para. 168.

282 *Ibid*.

283 *Ibid*., paras. 169–170.

STANDARDS TO ESTABLISH WHETHER AN "INTERFERENCE" WITH THE RIGHT OF ACCESS TO INFORMATION WAS JUSTIFIED

In order to be justified, a refusal of the state authorities to provide the relevant information to an applicant must be "prescribed by law", pursue one or more of the legitimate aims mentioned in Article 10(2) and be "necessary in a democratic society".

1. "Prescribed by Law"

As far as the standard "prescribed by law" is concerned, the notion of "law" is autonomous under the Convention (this means that domestic law is not a sufficient criterion to determine whether a norm is considered to be the "law").[284] It includes both statutory laws and judge-made law (in common law countries), as well as the rules of international law and the rules enacted by different administrative or professional authorities to which the law-making and disciplinary powers are delegated.[285] According to the Court's case-law, in order to satisfy the requests under this standard, a norm must be *accessible* and *foreseeable*. *Accessibility* means that the text of a norm must be available to applicants, *e.g*. an applicant must be "able to have an indication that is adequate in the circumstances of the legal rules applicable to a give case".[286] *Foreseeability* implies that "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [....] The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society [...]. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague [...]."[287]

2. "Legitimate Aim"

Article 10(2) enumerates the following legitimate aims the pursuit of which may justify restrictions on a right of access to information held by public authorities:

284 *The Sunday Times v. the United Kingdom*, App. no. 6538/74, Judgment of 26 April 1979.
285 Harris, et al., *op. cit*., p. 506.
286 *The Sunday Times v. the United Kingdom*, para. 49.
287 *Ibid*.

- the protection of national security;
- the protection of territorial integrity;
- the protection of public safety;
- the prevention of disorder or crime;
- the protection of health;
- the protection of morals;
- the protection of the reputation or rights of others;
- the prevention of the disclosure of information received in confidence; and,
- the maintenance of the authority and impartiality of the judiciary.

In the event the Court is satisfied that the restriction of a right of access to information is needed in pursuit of one of these aims, it usually sees no reason to proceed with the consideration of other aims pleaded by the State.[288]

3. "Necessary in a Democratic Society"

Apart from providing a reason for restricting the applicant's right of access to information consistent with Article 10(2), the State must show that the restriction is "necessary in a democratic society". According to the Court's case-law, the adjective "necessary", within the meaning of Article 10(2), implies the existence of a "pressing social need".[289] The Contracting States have a certain margin of appreciation in assessing whether such a need exists. However, the Court is empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 of the Convention.[290] This means that the Court "has to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" [...] In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts [...]."[291]

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288 Harris, et al., *op. cit.*, p. 510.

289 *Delfi AS v. Estonia*, App. no. 64569/09, Judgment of 16 June 2015, para. 131.

290 *Ibid*.

291 *Animal Defenders International v. the United Kingdom*, App. no. 48876/08, Judgment of 22 April 2013, para. 100.

II SELECTED CASES: COMMENTS AND CASE BRIEFS

In *Magyar Helsinki Bizottság v. Hungary*, the ECtHR for the first time acknowledged that freedom of expression, enshrined in Article 10 of the Convention, encompassed a right of access to information held by public authorities. The judgment has therefore been considered a "landmark victory for access to information" in Europe.[292] Its significance also stems from several other reasons. First, the Court used different interpretative approaches to determine that the right of access to information was closely related to "the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority", as stated in Article 10(1) of the Convention. The Court's interpretative approaches, particularly the use of the "living instrument doctrine" and the application of the principles of the Vienna Convention on the Law of Treaties, can prove particularly important for domestic courts when confronted with the need to clarify the emerging legal problems. Second, the judgement represents a consolidation of the European standards on the protection of the right of access to information, which the national courts should have in mind when deciding cases related to this right. Third, the ruling also clarifies that (a) the right of access to information excludes cases when it does not serve to furnish a public debate or press, and (b) that it does not extend to all but only to privileged categories of applicants: the press, NGOs, bloggers and popular users of the social media, academic researchers and authors of literature on matters of public concern.

The *Youth Initiative for Human Rights v. Serbia* case raised the issue of the positive obligations of the State, arising in respect of the accessibility of data controlled by the Government. The ruling confirms that like any other public body, intelligence agencies, except in specific cases, are obliged to provide access to information they hold. The Court reiterated that, in democratic societies, NGOs had an important "public watchdog" role, similar to that of the press. The judgment is also important because of the Court's readiness to uphold a violation of Article 10 of the Convention in cases where disclosure of the information at the domestic level has been imposed by an order of an independent body, including the Information Commissioner, whose position of an independent institution in the system of governance has been frequently undermined by political institutions in transitional democracies. Finally, in their joint concurring opinion, judges Sajó and Vučinić, encouraged the Court to extend the scope of the right

292 Parmar, *op. cit.*, p. 71.

of access to information to all: "In the world of the Internet the difference between journalists and other members of the public is rapidly disappearing. There can be no robust democracy without transparency, which should be served and used by all citizens."[293]

CASE OF MAGYAR HELSINKI BIZOTTSÁG V. HUNGARY
(Final Judgement 8 November 2016)

CASE BRIEF

I FACTS

The applicant, Magyar Helsinki Bizottság (*Hungarian Helsinki Committee*), a non-governmental organisation that monitors the implementation of international human rights standards in Hungary, conducted two projects between 2005 and 2009 aimed at developing and testing a model to eliminate the shortcomings in the system for the *ex officio* appointment of defence counsel. Within one of the projects, the applicant requested the names of the public defenders selected in 2008 and the number of assignments given to each lawyer from a total of twenty-eight police departments, situated in the seven Hungarian regions. The aim of the request was to demonstrate whether there were any discrepancies in the police departments' practices of appointing defence counsel from the lists provided by the bar associations. These requests were made under section 20(1) of the Hungarian Data Act. All but two police departments complied with the request. One of the police departments, which rejected the request, emphasised that "the names of the defence counsel are not public-interest data nor information subject to disclosure in the public interest under section 19(4) of the Data Act, since defence counsel are not members of a body performing State, municipal or public duties [...] Their names constitute private data, which are not to be disclosed under the law".

In 2009, the applicant brought an action against these two police departments, and the District Court found for the applicant, ordering the respondents to release the relevant information within 60 days. Both police departments appealed, and the second-instance court overturned the first-instance judgment and dismissed the applicant's claim in its entirety. In 2010, the applicant sought a review of the second-instance judgment. The Supreme Court dismissed the applicant's petition, upheld that judgment,

293 *Youth Initiative for Human Rights v. Serbia*, joint concurring opinion of judges Sajó and Vučinić, para. 1.

partly modifying its reasoning, and held as follows: "[...] the Court has [...] found that defence counsel cannot be regarded as "other persons performing public duties", [...] the names and number of appointments of defence counsel constitute personal data under section 2(1) of the Data Act. Accordingly, under section 19(4) of the Data Act, the respondent police departments cannot be obliged to surrender such personal data."

The applicant complained to the ECtHR that the authorities' denial of access to the information it sought amounted to a breach of its rights as set out in Article 10 of the Convention. The Government of the United Kingdom, intervening in the proceedings before the ECtHR, submitted that Article 10 of the Convention was not applicable in the circumstances of the present case. It asked the Court to take into account the *travaux préparatoires* and the case-law following the judgment in *Leander v. Sweden*. The Court also received third party comments from the Media Legal Defence Initiative, the Campaign for Freedom of Information, ARTICLE 19, the Access to Information Programme and the Hungarian Civil Liberties Union. They all took the view that the right to freedom of expression included a right of access to information, rendering Article 10 applicable in the present case.

II LEGAL ISSUES

(1) Whether Article 10 of the Convention can be interpreted as guaranteeing the applicant a right of access to information held by public authorities.

(2) Whether the denial of the applicant's request for information resulted, in the circumstances of the case, in an interference with its right to receive and impart information as guaranteed by Article 10.

III HOLDING (BY FIFTEEN VOTES TO TWO)

(1) The application is admissible;

(2) As to the first legal issue, a right of access to information held by a public authority "may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.";

(3) As to the second legal issue, there has been a violation of Article 10 of the Convention;

(4) As to just satisfaction, the respondent State is to pay the applicant, within three months, the EUR 215 in respect of pecuniary damage and EUR 8,875 plus any tax that may be chargeable to the applicant, in respect of costs and expenses.

IV MAJORITY REASONING

(a) Article 10 Guarantees a Right of Access to Information Held by Public Authorities

The Hungarian Government and the UK Government both argued that the authors of the Convention had omitted to mention a right of access to information in the text of the Convention precisely because they had not intended that the Contracting Parties should assume any such obligation. The Court first observed that, unlike comparable provisions in other international instruments, Article 10(1) did not specify that it encompassed a freedom to *seek* information. Notwithstanding the fact that such a right was not immediately apparent from the text of that provision, the Court laid down the principles for examining whether and to what extent a right of access to state-held information as such could be viewed as falling within the scope of "freedom of expression" under Article 10 of the Convention.

The Court observed that the question whether – in the absence of an express reference to access to information in Article 10 of the Convention – an applicant's complaint that he had been denied access could nevertheless be regarded as falling within the scope of this provision was a matter which has been the subject of gradual clarification in the Convention case-law over many years, both by the former European Commission of Human Rights and by the Court. In this regard, it emphasised its ruling in the *Leander* case and noted that, in a series of subsequent judgments, it had found that there had been an interference with a right protected by Article 10(1) in situations where the applicant was deemed to have had an established right to the information under domestic law, in particular based on a final court decision, but where the authorities had failed to give effect to that right. The Court considered that this line of case-law did not represent a departure from, but rather an extension of the *Leander* principles, and that it referred to situations where, as described by the intervening Government, one arm of the State had recognised a right to receive information but another arm of the State had frustrated or failed to give effect to that right. Concurrently with the aforementioned line of case-law, a closely related approach, set out in the *Társaság* and *Österreichische Vereinigung* judgments, emerged, in which the Court recognised, subject to certain conditions – irrespective

of the domestic-law considerations – the existence of a limited right of access to information, as part of the freedoms enshrined in Article 10 of the Convention. The Court stressed that the fact that it had not previously articulated in its case-law the relationship between the *Leander* principles and the more recent developments did not mean that they were contradictory or inconsistent.

The Court also emphasised that the survey of the Convention institutions' case-law demonstrated that there had been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the Convention. It noted that this development was also reflected in the stance taken by international human-rights bodies, linking the watchdogs' right of access to information to their right to impart information and to the general public's right to receive information and ideas. According to the Court, it is of paramount importance that nearly all of the thirty-one CoE Member States surveyed have enacted legislation on freedom of information. Finally, the Court found that the existence of the Convention on Access to Official Documents was an additional indicator of common ground in this context.

The Court stressed that whether and to what extent the denial of access to information constituted an interference with an applicant's freedom-of-expression rights had to be assessed in each individual case and in the light of its particular circumstances. In order to define the scope of such a right, the Court established the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and, (d) ready and available information.

(b) Reasons why the Court found a violation of Article 10 of the Convention

– Whether there had been an interference with the applicant's right –

First, as to the purpose of the information request, the Court accepted that the applicant had wished to exercise the right to impart information on a matter of public interest and sought access to information to that end. In the Court's view, the information requested by the applicant (names of the public defenders) from the police departments was, undisputedly, within the subject area of its research. In addition, the applicant wished to collect nominative information on the individual lawyers in order to demonstrate any recurrent

appointment patterns. The Court particularly stressed that, had the applicant limited its inquiry to anonymised information, as suggested by the Hungarian Government, it would in all likelihood have been unable to produce verifiable results in support of its criticism of the existing scheme. In the Court's view, the two departments' refusal to provide information represented an obstacle to producing and publishing a fully comprehensive survey and, therefore, the applicant was unable to contribute to a public debate drawing on accurate and reliable information. Accordingly, the information was therefore "necessary" for the applicant's exercise of its right to freedom of expression.

Second, with regard to the nature of the information, the Court observed that the domestic authorities had made no assessment whatsoever of the potential public-interest character of the information sought and had been concerned only with the status of public defenders from the perspective of the Data Act. The Court noted that this approach deprived the public-interest justification relied on by the applicant of any relevance. In the Court's view, however, the information on the appointment of public defenders was of an eminently public-interest nature, irrespective of whether public defenders could be qualified as "other persons performing public duties" under the relevant national law.

Third, as to the role of the applicant, the Court emphasised that it was common ground between the parties that the present case concerned a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law.

Lastly, the Court noted that the information was ready and available and, moreover, that it had not been argued before the Court that its disclosure would have been particularly burdensome for the authorities.

In sum, the Court found that the information sought by the applicant from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. The Court, therefore, found an interference with a right protected by this provision.

The Court then proceeded to examine whether the interference was justified.

(c) Reasons why the Court found a violation of Article 10 of the Convention

– Whether the interference was justified –

To recall, in order to be justified, an interference with an applicant's right to freedom of expression must be "prescribed by law", pursue one or more of the legitimate aims mentioned in Article 10(2), and be "necessary in a democratic society".

Prescribed by law. The Court observed that the parties disagreed as to whether the interference with the applicant NGO's freedom of expression was "prescribed by law".[294] The Court noted that the Hungarian Supreme Court's interpretation was in line with the Recommendation of the Parliamentary Commissioner for Data Protection, published in 2006, and found that the interference was "prescribed by law" within the meaning of the second paragraph of Article 10.

Legitimate aim. The Court noted that it was not in dispute between the parties that the restriction on the applicant's freedom of expression pursued the legitimate aim of protecting the rights of others, which was also the Court's view.

Necessary in a democratic society. The Court first summarised the fundamental principles concerning the question whether an interference with the freedom of expression was "necessary in a democratic society", and then observed that the central issue underlying the applicant's grievance was that the information sought was characterised by the authorities as personal data not subject to disclosure.[295] The Court underlined that the disclosure of information relating to an individual's private life came under the concept of "private life", a broad term not susceptible to exhaustive definition.

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294 The Court observed that the difference in the parties' opinions on the applicable law originated in their diverging views on the issue of how public defenders were to be characterised in the domestic law. The applicant relied on section 19(4) of the Data Act and argued that it expressly provided for the disclosure of personal data of "other persons performing public duties", whereas there was no provision prohibiting the disclosure of the names of *ex officio* appointed defence counsel. The Government, for their part, referred to the opinion of the Data Protection Commissioner and the judgments of the domestic courts interpreting section 19(4) of the Data Act to the effect that *ex officio* appointed defence counsel were not "other persons performing public duties", and thus their personal data could not be disclosed. The Court underlined that its only task here was confined to determining whether the methods adopted and the effects they entailed were in conformity with the Convention.

295 This was so because, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental functions or was related to other persons performing public duties. Since the Supreme Court's ruling excluded public defenders from the category of "other persons performing public duties", there was no legal possibility open to the applicant NGO to argue that the disclosure of the information was necessary for the discharge of its watchdog role.

In determining whether the personal information retained by the authorities related to the relevant public defenders' enjoyment of their right to respect for private life, the Court had regard to the specific context. The information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. It held that, in this sense, the public defenders' professional activities could not be considered to be a private matter. Moreover, the Court said that the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. In the Court's view, the disclosure of the public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders. Accordingly, the interests invoked by the Hungarian Government with reference to Article 8 of the Convention were not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the applicant's right as protected by Article 10(1).

Yet, the Court underlined that Article 10 did not guarantee an unlimited freedom of expression and that the salient question was whether the means used to protect those interests were proportionate to the aim sought to be achieved. In this regard, the Court noted that the subject matter of the survey concerned the efficiency of the public defenders' system and that this issue was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention. In the Court's view, the contention that the legal-aid scheme might be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – raised a legitimate concern. Therefore, the Court did not find that the privacy rights of the public defenders would have been negatively affected had the applicant's request for the information been granted.

The Court accepted that there was a causal link between the violation found and the pecuniary damage alleged; it therefore awarded the full sum claimed. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court considered it reasonable to award the full sum claimed.

CASE OF YOUTH INITIATIVE FOR HUMAN RIGHTS V. SERBIA
(Final Judgement 25 June 2013)

CASE BRIEF

I FACTS

In October 2005, the applicant, a non-governmental organisation Youth Initiative for Human Rights, based in Belgrade, requested of the intelligence agency of Serbia (*Bezbednosno-informativna agencija*) to inform it how many people had been subjected to electronic surveillance by that agency in 2005.

The Agency first rejected the request (in November 2005), relying on section 9(5) of the Serbian Freedom of Information Act of 2004, which specified that access to information of public interest may be refused in certain cases.[296]

The applicant then complained to the Information Commissioner (*Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti* – "the Information Commissioner"), a body set up under the Freedom of Information Act to ensure the observance of that Act, which found in December 2005 that the intelligence agency had violated the law and ordered that the information requested be made available to the applicant within three days. The Agency appealed, but the Supreme Court of Serbia held that it lacked standing and dismissed its appeal.

Finally, in 2008, after an order by the Information Commissioner that the information at issue be nevertheless disclosed, the intelligence agency notified the applicant that it did not hold the information requested.

II LEGAL ISSUES

(1) Whether the intelligence agency had denied the applicant access to certain information by refusing to provide it with the requested information and whether it had thereby violated a right of access to information embraced by freedom of expression guaranteed in Article 10 of the Convention.

(2) Whether the intelligence agency's refusal to comply with the order of the Information Commissioner amounted to a violation of Article 6 of the Convention.

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296 Section 9(5) of the Serbian Freedom of Information Act of 2004 reads:

"Access to information of public interest may be refused, if its disclosure would:

(5) Disclose information or a document formally qualified as State, official, commercial or other secret, or as accessible to a limited group of people, if the disclosure of that information or document could seriously undermine a legitimate interest which has priority over freedom of information."

III HOLDING (UNANIMOUSLY)

(1) The complaint under Article 10 of the Convention is admissible;

(2) As to the first legal issue, there has been a violation of Article 10 of the Convention;

(3) As to the second legal issue, there is no need to examine the complaint under Article 6 of the Convention;

(4) The respondent State [Serbia] must ensure, within three months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, that the intelligence agency of Serbia provide the applicant with the information requested;

(5) The finding of a violation and the order made under point 4 constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

IV REASONING

(a) Reasons why the Court found the application admissible

The Court declared the application admissible after it considered and rejected all of the Government's objections regarding its inadmissibility and after it established that the application was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention.

On account of admissibility, the Government argued that:

(1) The application was out of time (taking into account the dates of the decisions of the Information Commissioner and the Supreme Court of Serbia in the applicant's case);

(2) Article 10 did not guarantee a general right of access to information and therefore the application was incompatible *ratione materiae*; and

(3) The application was incompatible *ratione personae* as the applicant did not need the information sought.

With regard to the first objection, the Court noted that the applicant had not complained about the decisions to which the Government referred, but about the intelligence agency's refusal to provide it specific information despite those decisions. Given the fact that the applicant filed the application with the Court while the impugned situation was ongoing, the first objection had to be rejected.

With regard to the second objection, the Court emphasised that the notion of "freedom to receive information" embraced a right of access to information

and referred to its decision in *Társaság a Szabadságjogokért v. Hungary* and, therefore, rejected the second objection as well.[297]

The Court also rejected the third objection on the basis of public interest, insisting that the applicant's activities warranted similar Convention protection to that afforded to the press. Namely, it held that when a non-governmental organisation was involved in matters of public interest, such as the applicant [Youth Initiative for Human Rights monitors the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law], it was exercising a role as a public watchdog of similar importance to that of the press.[298] Accordingly, the Government's remaining objections had to be rejected.

Acting *ex officio*, the Court thus held that the complaint was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention.

(b) Reasons why the Court found a violation of Article 10 of the Convention

– Whether there has been an interference with the applicant's right –

The Court did not find persuasive the Government's argument that freedom to receive information merely prohibited a State from restricting a person from receiving information that others wished or might be willing to impart to him. It also rejected their claim that, in the circumstances of the present case, freedom to receive information could not be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.

The Court supported the applicant's claim that the refusal of the intelligence agency to provide it with information as to the use of electronic surveillance measures had adversely affected its ability to exercise its role as a public watchdog, in breach of Article 10 of the Convention. The Court emphasised that the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate.[299] Accordingly, it held that there had been an interference with the applicant's right to freedom of expression.

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297 *Társaság a Szabadságjogokért v. Hungary*, *op. cit*.

298 The Court referred to its conclusion in *Animal Defenders International v. the United Kingdom,* para. 103.

299 The Court referred to *Társaság a Szabadságjogokért v. Hungary*, para. 28, and *Kenedi v. Hungary*, para. 43.

(c) Reasons why the Court found a violation of Article 10 of the Convention

– Whether the interference was justified –

Prescribed by law. The Court noted that the exercise of freedom of expression may be subject to restrictions, but emphasised that any such restrictions ought to be in accordance with domestic law. The Court established that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. It observed that the domestic body, which had been set up precisely to ensure compliance with the 2004 Freedom of Information Act, had examined the case and decided that the information sought had to be provided to the applicant. Although the intelligence agency eventually responded that it did not hold the information, that response was unpersuasive in view of the nature of the information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response. It therefore concluded that the obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner was in defiance of domestic law and tantamount to arbitrariness, finding, accordingly, a breach of Article 10 of the Convention.

(d) Reasons why the Court found it unnecessary to consider the alleged violation of Article 6 of the Convention

By analogy to its approach in *Lepojić v. Serbia*,[300] and *Filipović v. Serbia,*[301] after its finding relating to Article 10 of the Convention, the Court considered that it was not necessary to examine the admissibility or the merits of the same complaint under Article 6 of the Convention.

(e) Reasons why the Court applied Article 46 of the Convention

The Court considered what consequences may be drawn for Serbia from Article 46 of the Convention. As it recalled, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far

300 *Lepojić v. Serbia*, App. no. 13909/05, Judgment of 6 November 2007, para. 79.

301 *Filipović v. Serbia*, App. no. 27935/05, Judgment of 20 November 2007, para. 60.

as possible the effects.[302] The aim is to observe the *restitutio in integrum* principle here, that is, to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded. The Court therefore ordered Serbia to ensure, within three months from the date on which the judgment became final, that the Serbian intelligence agency provide the applicant with the information requested.

Although the applicant claimed EUR 8,000 for the non-pecuniary damage suffered, the Court considered that the finding of a breach and the order in accordance with Article 46 of the Convention constituted sufficient just satisfaction for any non-pecuniary damage which the applicant might have suffered.

302 The Court referred to its decision in *Scozzari and Giunta v. Italy*, App. nos. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

III LIST OF ECTHR CASES CITED IN THE CHAPTER

Animal Defenders International v. the United Kingdom, 48876/08 (2013)

Bladet Tromsø and Stensaas v. Norway, 21980/93 (1999)

Case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land– und forstwirtschaftlichen Grundbesitzes v. Austria, 39534/07 (2013)

Delfi AS v. Estonia, 64569/09 (2015)

Filipović v. Serbia, 27935/05 (2007)

Guseva v. Bulgaria, 6987/07 (2015)

Kenedi v. Hungary, 31475/05 (2009)

Leander v. Sweden, 9248/81 (1987)

Lepojić v. Serbia, 13909/05 (2007)

Magyar Helsinki Bizottság v. Hungary, 18030/11 (2016)

Roşiianu v. Romania, 27329/06 (2014)

Scozzari and Giunta v. Italy, 39221/98 and 41963/98 (2000)

Sdruženi Jihočeské Matky v. the Czech Republic, 19101/03 (2006)

The Sunday Times v. the United Kingdom, 6538/74 (1979)

Youth Initiative for Human Rights v. Serbia, 48135/06 (2013)

Társaság a Szabadságjogokért v. Hungary, 37374/05 (2009)

Chapter 5: PROTECTION OF PROPERTY UNDER ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 1 OF PROTOCOL NO. 1
Protection of Property

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

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

I INTRODUCTION

This Chapter deals with the protection of property, enshrined in Article 1 of Protocol No. 1 to the Convention. It starts with general observations regarding the structure of Article 1 of Protocol No. 1, the three limbs it contains and their interconnectedness. Following these observations, it outlines the scope of the right of property, both its including and excluding trends, paying due attention to the fact that property is considered an autonomous concept in Convention case law. It then goes on to explain all three modes of interference with property: deprivation of property, control of the use of property and interference with the peaceful enjoyment of property. Finally, it details the conditions justifying interference with property, notably lawfulness, legitimate aim and fair balance. With a view to illustrating the reasoning of the Court and presenting the principles the Court applies when reviewing potential violations of the right to property, this Chapter also contains short

comments and case briefs of *Ramadhi and Others v. Albania,*[303] *S. A. Dangeville v. France*,[304] *Guiso-Gallisay* v. *Italy,*[305] and *Grudić v. Serbia*.[306]

GENERAL OBSERVATIONS

Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three limbs or distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.[307] Before establishing whether the first general rule has been respected, the Court examines whether the other two are applicable. However, as the Court has pointed out, the three rules are not "distinct" in the sense of being unconnected: "The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule".[308]

SCOPE OF THE RIGHT OF PROPERTY

Article 1 of Protocol No. 1 stipulates that "every natural or legal person is entitled to the peaceful enjoyment of his possessions." Very early on in its case-law, the Court clarified that by recognising that everyone had the right to the peaceful enjoyment of his possessions, Article 1 of Protocol No. 1 in substance guaranteed the right of property. According to the Court, this was the clear impression, which had been left by the words "possessions" and "use of property" (in French: *biens*, *propriété*, *usage des biens*). The Court also referred to the *travaux préparatoires*, which, for their part, confirmed unequivocally that "the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 (P1-1)". Indeed, as

303 *Ramadhi and Others v. Albania,* App. no. 38222/02, Judgment of 13 November 2007.

304 *S. A. Dangeville v. France*, App. no. 36677/97, Judgment of 16 April 2002.

305 *Guiso-Gallisay* v. *Italy,* App. no. 58858/00, Judgment of 22 December 2009.

306 *Grudić v. Serbia*, App. no. 31925/08, Judgment of 17 April 2012.

307 *Anheuser-Busch Inc. v. Portugal*, App. no. 73049/01, Judgment of 11 January 2007, para. 62.

308 *Ibid*., para. 62.

pointed out by the Court, "the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".[309]

If it was undisputed that the right of property was enshrined in Article 1 Protocol No. 1 to the Convention, it was by no means clear how the concept of property should be interpreted. As early as in *Marckx v. Belgium*, the Court ruled that "property" was an autonomous concept for the purposes of Article 1 of Protocol No. 1, the scope of which it defined in its subsequent case-law.

Property, or possessions for the purposes of attracting the protection of Article 1 of Protocol No. 1, covers a wide range of interests, claims and assets.[310] As the Court affirmed: "The concept of "possessions" in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision".[311] In the Court's view, the issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.[312]

INCLUDING AND EXCLUDING TRENDS

Two trends may be observed in the Court's case-law regarding the scope of the autonomous concept of property or possessions. One trend includes certain assets or rather interests into the concept, whereas the other does just the opposite – it aims to exclude certain notions from the scope of protection of the provision.[313]

1. Including Trend

The Court has considered that business and professional interests fall within the scope of the concept of property. In a case which concerned practicing accountants, whose registration as chartered accountants was refused after the adoption of the new legislation, the Court noted that the right relied

309 *Marckx v. Belgium*, App. no. 6833/74, Judgment of 13 June 1979, para. 63.

310 Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet and Maxwell, Thomson Reuters, 2012, p. 681.

311 *Beyeler v. Italy*, App. no. 33202/96, Judgment of 5 January 2000, para. 100.

312 *Anheuser-Busch Inc. v. Portugal*, para. 63.

313 Dragoljub Popović, *Protecting Property in European Human Rights Law*, Utrecht, Eleven International Publishing, 2009, p. 17.

upon by the applicants could be likened to the right of property embodied in Article 1 of Protocol No. 1: "By dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1)."[314] Similarly, the Court considered that the withdrawal of the licence to serve alcoholic beverages in a restaurant had adverse effects on the goodwill and the value of its business. In other words, the maintenance in force of the licence to which the applicant claimed to be entitled was one of the principal conditions for carrying on its business activities. Therefore, the economic interests connected with the running of the restaurant were "possessions" for the purposes of Article 1 of the Protocol.[315]

The Court has also considered that Article 1 of Protocol No. 1 applies to intellectual property. In *Melnychuk v. Ukraine*, which concerned an alleged violation of the applicant's copyright, the Court reiterated that Article 1 of Protocol No. 1 was applicable to intellectual property,[316] and, in *Anheuser-Busch Inc. v. Portugal*, that a trademark constituted a "possession" within the meaning of Article 1 of Protocol No. 1.[317]

Claims and debts in respect of property have to be sufficiently established to be enforceable in order to attract the protection of Article 1 of Protocol No. 1. The Court has held that "possessions" can be "existing possessions" or assets, including, in certain well-defined situations, claims. "For a claim to be capable of being considered an "asset" falling within the scope of Article 1 of Protocol No. 1, the claimant must establish that it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it or where there is a final court judgment in the claimant's favour. Where that has been done, the concept of "legitimate expectation" can come into play".[318] For instance, the arbitration award, which conferred on the applicants a right in the sums awarded, constituted a "possession" within the meaning of Article 1 of Protocol No. 1. While admitting that the right was revocable, since the award could still be annulled, the Court took into account that ordinary courts had by then already twice held – at first instance and on appeal – that there was no ground for such annulment.[319] The Court also found that the applicant company's claim against the State for the VAT paid in error was of a nature to constitute an asset and therefore

314 *Van Marle and Others v. the Netherlands*, App. no. 8543/79; 8674/79; 8675/79; 8685/79, Judgment of 26 June 1986, para. 41.

315 *Tre Traktörer Aktiebolag v. Sweden*, App. no. 10873/84, Judgment of 7 July 1989, paras. 43 and 53.

316 *Melnychuk v. Ukraine*, App. no. 28743/03, Inadmissible, Decision of 5 July 2005.

317 *Anheuser-Busch Inc. v. Portugal*, paras. 46 and 72.

318 *Ramadhi and Others v. Albania,* para. 67.

319 *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. no. 13427/87, Judgment of 9 December 1994, para. 62.

amounted to a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1.[320]

Bank accounts can also attract the protection of Article 1 of Protocol No. 1. In *Suljagić v. Bosnia-Herzegovina*, the Court held that the applicant, upon depositing foreign currency with a commercial bank, had acquired an entitlement to collect at any time his deposit, together with accumulated interest, from the commercial bank or, in the event of its "manifest insolvency" or bankruptcy, from the State. The applicant's claim amounted to a "possession" within the meaning of Article 1 of Protocol No. 1.[321]

2. Excluding Trend

Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Furthermore, the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim, which has lapsed as a result of a failure to fulfil the condition.[322]

However, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example, where there is settled case-law of the domestic courts confirming its existence.[323] However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts.[324]

MODES OF INTERFERENCE WITH PROPERTY

The right of property is not an absolute right and it may be restricted under certain conditions. As noted, Article 1 of Protocol No. 1 contains three distinct rules. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain

320 *S. A. Dangeville v. France*, para. 48.

321 *Suljagic v. Bosnia-Herzegovina*, App. no. 27912/02, Judgment of 3 November 2009, paras. 35–36.

322 *Gratzinger and Gratzingerova v. the Czech Republic*, App. no. 39794/98, Decision of 10 July 2002, para 69.

323 *Kopecký v. Slovakia*, App. no. 44912/98, Judgment of 28 September 2004, para. 52.

324 *Ibid*., para. 50

conditions; and, the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.

There are three different modes of State interference with property: deprivation of property, control of its use, and interference, in the narrow sense, with the peaceful enjoyment of property.

1. Deprivation of Property

Deprivation of property is the most far reaching type of State interference with property, as it deprives a person of his/her title in respect of property. "The deprivation of property or expropriation destroys the right of property, because it transfers the title from an individual to a government or another public body, or even to somebody else in case of beneficiaries of social reforms, as shown in the ECHR case-law."[325]

The Convention refers to expropriation in the second sentence of the first paragraph of Article 1 of Protocol No. 1, stipulating that "[N]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

A formal taking or expropriation of property will certainly lead to the conclusion that there has been a deprivation of possessions within the second rule of Article 1 of Protocol No. 1. However, the Court also considers that the formal act of expropriation is not necessary to establish that there has been a deprivation of possessions. Relying on the premise that "the Convention is intended to guarantee rights that are "practical and effective"," the Court insists that "it has to be ascertained whether the situation amounted to a *de facto* expropriation". And, for that purpose, it has "to look behind the appearances and investigate the realities of the situation complained of." For instance, in *Turgut and Others v. Turkey*, the applicants submitted that the annulment of their document of title to land and its re-registration in the name of the Treasury, without payment of compensation, constituted disproportionate interference with their right to the peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1. The Court noted that there had indeed been an interference with the applicants' right to the peaceful enjoyment of their possessions, which had actually amounted to a "deprivation" of property within the meaning of the first paragraph of Article 1 of Protocol No. 1.[326]

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325 Popović, *op. cit.*, p. 29.

326 *Turgut v. Turkey*, App. no. 1411/03, Judgment of 8 July 2008, paras. 83 and 88.

2. Control of the Use of Property

Contrary to expropriation, the control of the use of property is "the lightest form of interference with property rights, for it usually does not create any change in terms of ownership or title. The title remains with the person it belonged to before the interference took place, although such an entitled person might find her/himself somewhat restricted in the use of the property."[327]

The Convention refers to the control of the use of property in the second sentence of the first paragraph of Article 1 of Protocol No. 1, stipulating that the right to protection of property shall not "in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Court made the distinction between the deprivation of property and the control of the use of property in *Handyside v. the United Kingdom*. This case concerned two distinct measures of interference with the right of property: seizure of the matrix and of hundreds of copies of the "The Little Red Schoolbook", on the one hand, and their forfeiture and subsequent destruction following the trial, on the other. The applicant argued that both measures had interfered with his right "to the peaceful enjoyment of his possessions".[328]

The Court found that the seizure complained of had been provisional. In the Court's view, it had prevented the applicant, for a period, from enjoying and using his possessions of which he had remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal. In these circumstances, the Court thought that the second sentence of the first paragraph of Article 1 of Protocol No. 1 did not come into play in this case. The Court, however, admitted that the expression "deprived of his possessions" in the English text could lead one to think otherwise. However, the structure of Article 1 of Protocol No. 1 led the Court to the conclusion that that sentence applied only to someone who was "deprived of ownership" ("*privé de sa propriété*").[329] On the other hand, there was no question for the Court that the seizure did relate to "the use of property" and thus fell within the ambit of the second paragraph. As to the forfeiture and destruction of the Schoolbook, the Court was also clear that they had represented a permanent deprivation of the applicant of the ownership of certain possessions.[330]

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327 Popović, *op. cit.,* p. 30.

328 *Handyside v. the United Kingdom*, no. 5493/72, Judgment of 7 December 1976, para. 61.

329 *Ibid.*, para. 62.

330 *Ibid.*, para. 63.

3. Interference with the Peaceful Enjoyment of Property

Peaceful enjoyment of property is the expression used in the first sentence of the first paragraph of Article 1 of Protocol 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions." The introduction in the Court's case-law of a third category of interference – interference with the peaceful enjoyment of property – in addition to the deprivation of property and the control of the use of property, is explained by practical reasons. "In certain cases the judges could not reach a fair conclusion basing a judgment either on the idea of expropriation or on the control of the use of property. In such situations, they applied the approach seeking a basis in the first paragraph of Article 1 First Protocol, which created a specific pattern within the scope of that provision."[331]

How the interference with peaceful enjoyment of property comes into play can be observed in *Sporrong and Lonnroth v. Sweden*. This case concerned the legislation on expropriation allowing the government to grant in advance to the Stockholm City Council a zonal expropriation permit. The permit was accompanied by a prohibition of construction for individuals in specific areas.[332] The Court found that, although the expropriation permits had left intact in law the owners' right to use and dispose of their possessions, they had nevertheless significantly reduced the possibility of its exercise in practice. The Court also noted that they had affected the very substance of ownership in that they had recognised before the event that any expropriation would have been lawful and had authorised the City of Stockholm to expropriate whenever it found it expedient to do so. Thus, the Court concluded, the applicants' right of property had become precarious and defeasible. As to the prohibitions on construction, the Court had no doubts that they had restricted the applicants' right to use their possessions.[333] The Court concluded that there had been an interference with the applicants' right of property and that the consequences of that interference had been undoubtedly rendered more serious by the combined use, over a long period of time, of expropriation permits and prohibitions on construction.[334]

Similarly, in *Iatridis v. Greece*, the applicant, who had a specific licence to operate the cinema he had rented, was evicted from it by the Ilioupolis Town Council and had not set up his business elsewhere. In those circumstances, the Court concluded that there had been interference with the applicant's property rights. Since he had held only a lease of his business premises, this

331 Popović, *op. cit*., p. 49.

332 *Sporrong and Lonnroth v. Sweden,* paras. 10–25.

333 *Ibid.*, para. 60.

334 *Ibid.*

interference, in the Court's view, neither amounted to an expropriation nor was an instance of controlling the use of property, but came under the first sentence of the first paragraph of Article 1 of Protocol No. 1.[335]

CONDITIONS UNDER WHICH INTERFERENCE WITH PROPERTY IS JUSTIFIED

There are three conditions that must be fulfilled for a State's interference with property to be justified – lawfulness, legitimate aim and proportionality – which apply to all three categories of interference.

1. Lawfulness

The Court considers that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful.[336] The principle of legality is enshrined *expressis verbis* in the second sentence of the first paragraph, which authorises a deprivation of possessions only "subject to the conditions provided for by law", and in the second paragraph, which recognises that the States have the right to control the use of property by enforcing "laws". These phrases require in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions.[337]

Moreover, the Court has held that "the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it."[338] It follows that other conditions of interference with property – the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights – are examined only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.

Contracting Parties usually do not have difficulty proving the lawfulness of their interferences. This condition was not, however, satisfied in *Iatridis v.*

335 *Iatridis v. Greece*, App. no. 31107/96, Judgment of 25 March 1999, para. 55.
336 *Ibid*., para. 58.
337 *Lithgow and Others v. the United Kingdom*, para. 110.
338 *Iatridis v. Greece*, para. 58.

Greece. To recall, the applicant, who had a specific licence to operate the cinema he had rented, was evicted from it by the Ilioupolis Town Council. The eviction certainly had a legal basis in domestic law. However, the Athens Court of First Instance heard the case and quashed the eviction order on the grounds that the conditions for issuing it had not been satisfied. From that moment on, the applicant's eviction thus ceased to have any legal basis and the Ilioupolis Town Council became an unlawful occupier. The return of the cinema to the applicant was prevented by the Finance Minister's refusal to revoke its assignment to the Council.[339] The Court considered that the interference in question had been manifestly in breach of Greek law and, accordingly, incompatible with the applicant's right to the peaceful enjoyment of his possessions and, therefore, found a violation of Article 1 of Protocol No. 1.[340] The non-satisfaction of the lawfulness condition rendered it unnecessary to ascertain whether a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

2. Legitimate Aim

In general, interference with property takes place so that State can fulfil its task of satisfying the public interest. The Court has itself admitted that the notion of "public interest" is necessarily extensive,[341] so it may become a point of controversy.[342] Nevertheless, "public interest has been accepted as being involved in almost all cases so far."[343]

The Court's general standing is that the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest", because of the direct knowledge of their society and its needs. Here, as in other fields to which the safeguards of the Convention extend, the national authorities enjoy a certain margin of appreciation: "It is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken."[344]

The decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. Hence, the Court,

339 *Ibid.*, para. 61.
340 *Ibid.*, para. 62.
341 *Hentrich v. France*, Application no. 13616/88, Judgment of 22 September 1994, para. 39.
342 Popović, *op. cit.*, p. 49.
343 Reid, *op. cit.*, p. 423.
344 *James and Others v. the United Kingdom*, App. no. 8793/79, 21 February 1986, para. 46.

finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, accepts to "respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted."[345]

Public interest has included: planning restrictions for environmental concerns;[346] expropriation of a site of historic and cultural significance;[347] *de facto* expropriation for the protection of nature and forests;[348] preservation of sites of cultural heritage;[349] expropriation of estates of the former ruling royal house;[350] righting the social injustice, which had been felt to be caused to occupying tenants by the operation of the long leasehold system of tenure;[351] transfer of monastery land for the purpose of ending illegal sales and encroachments and controlling development;[352] seizure of the "Little Red Schoolbook" for the purpose of "the protection of morals";[353] organising the fiscal policies and making arrangements – such as the right of pre-emption – to ensure that taxes are paid;[354] and, *de facto* expropriation to build a base and officers' resort (national defence policy).[355]

3. Proportionality

The Court holds that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but that "there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[356] This latter requirement was expressed in the *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck

345 *Ibid*.

346 *Pine Valley Developments Ltd and Others v. Ireland*, App. no. 12742/87, Judgment of 29 November 1991.

347 *Kozacioglu v. Turkey*, App. no. 2334/03, Judgment of 19 February 2009.

348 *Turgut v. Turkey*, para. 90.

349 *Potomska and Potomski v. Poland*, App. no. 33949/05, Judgment of 29 March 2011, para. 64.

350 *Former King of Greece v. Greece*, App. no. 25701/94, Judgment of 23 November 2000.

351 *James and Others v. the United Kingdom*, para. 47.

352 *Holy Monasteries v. Greece*, App. no. 13092/87; 13984/88, Judgment of 9 December 1994.

353 *Handyside v. the United Kingdom*, para. 62.

354 *Hentrich v. France*, para. 39.

355 *Papamichalopoulos v. Greece*, App. no. 14556/89, 24 June 1993.

356 *Lithgow and Others v. the United Kingdom*, para. 120.

"between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[357] The Court also specified that, in the given case, the requisite balance would not be found if the person concerned had had to bear "an individual and excessive burden".[358] In the Court's view, the search for this balance is reflected in the structure of Article 1(1) of Protocol No. 1 as a whole, independently of the type of interference with the property suffered by the applicant.[359]

The Court's position of principle is that "compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions."[360] Although the text of Article 1 of Protocol No. 1 is silent on the point of compensation, the Court considers that, under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances and that the protection of the right of property, for the purposes of Article 1 of Protocol No. 1, would be largely illusory and ineffective in the absence of any equivalent principle.[361]

It follows that there is no interference with property without compensation, unless exceptional circumstances intervene. However, "what the exceptional circumstances in respect of payment of compensation really are cannot be properly discerned. There is no comprehensive definition in the case law of the Court. The ECtHR exercised a certain amount of legal existentialism by applying a case to case method of approach to this rather complex and troublesome issue."[362]

As per the standard of compensation, the Court considers that an interference with property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference, which cannot be considered justifiable under Article 1 of Protocol No. 1. However, the Court has also held that Article 1 of Protocol 1 "does not guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."[363]

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357 *Sporrong and Lönnroth*, para. 69.
358 *Ibid.*, para. 73.
359 *Lithgow and Others v. the United Kingdom*, para. 120.
360 *Ibid*.
361 *Ibid*.
362 Popović, *op. cit.*, p. 59.
363 *James and Others v. the United Kingdom*, para. 54.

Although compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake, and whether an excessive burden has been imposed on the applicant, the Court will also look at the circumstances as a whole for the purposes of the proportionality test. In particular: the issue of lawfulness, the length of time involved, procedural safeguards, and the effect on the applicant.[364]

II SELECTED CASES: COMMENTS AND CASE BRIEFS

Cases outlined in this Chapter exemplify different types of violations of Article 1 of Protocol No. 1 to the Convention and the Court's responses to them. They also reflect the challenges the Western Balkan countries have been confronting in the protection of property.

In the Western Balkan countries, restitution cases are among the most numerous when it comes to interference with the right to property, under Article 1 of Protocol No. 1 to the Convention. These interferences are often coupled with the problem of non-enforcement of the court judgments and administrative bodies' decisions, or even with the non-existence of effective legal remedies. All these issues are present in the case of *Ramadhi and Others v. Albania* in which the Court found a violation not only of Article 1 of Protocol No. 1, but also of Articles 6(1) and 13 of the Convention, and accorded just satisfaction to the applicants.

Taking into account that these violations had originated in a widespread problem affecting large numbers of people, the Court applied Article 46 of the Convention. Consequently, it indicated to Albania to introduce a remedy that would secure genuinely effective redress for the Convention violations identified in the instant judgment as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Articles 6(1) and 13 of the Convention and Article 1 of Protocol No. 1. The Court also noted that, by introducing the relevant remedy, the State should, *inter alia*, designate the competent body, set out the procedural rules, ensure compliance with such rules in practice and remove all obstacles to the award of compensation under the Property Act.

The *S. A. Dangeville v. France* case is indicative of another common problem in administrative law adjudication, namely of un-harmonised case law. This case concerned the applicant company's claim against the State for the VAT

364 Reid, *op. cit.*, p. 424.

paid in error, which was of a nature to constitute an asset. Therefore, the claim amounted to a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. The applicant complained not only about the disproportionate interference with its peaceful enjoyment of property, but a violation of the prohibition of discrimination, protected under Article 14 of the Convention, as well. The argument was that there had been a difference of treatment between the applicant company and other companies that had not paid the VAT, against which proceedings had been abandoned, as well as a difference of treatment between the applicant company and another company in an identical situation, whose claims against the State for the VAT paid in error had been honoured. Although the Court examined the case only under Article 1 of Protocol No. 1, it did include in its examination of the proportionality of the impugned measure the arguments about the equality of treatment, which thereby contributed to its finding of a breach of the right of property.

The judgment in the case of *Guiso-Gallisay* v*. Italy* is a landmark ruling on the important issue of determining the relevant moment in time for assessing the loss sustained by an individual in case of constructive expropriation. The Court overruled its previous stance and it is important to examine the judgment and how the Court reached its ruling on the issue. The starting point was the Court's prior method of assessing damage, which, in the view of the majority of judges, turned out to be inappropriate. The Court clearly explained the reasons for the overruling, which seem to be quite convincing despite the fact that the judges were not unanimous in rendering this judgment. The rule set in this case has been followed by the Court ever since.

Finally, the *Grudić v. Serbia* case is important from several standpoints. Firstly, the facts of the case reflect a peculiar situation that exists in respect of the payment of pensions after the disintegration of Yugoslavia and especially as regards Kosovo*. The Court's ruling endorses the standpoint that human rights protection should be the starting point in dealing with problems of that kind, and not a *raison d'état*.

Another important aspect of the case is to be found in the Court's reasoning, which sheds special light on the topics concerning broader issues of constitutional law. Those issues tackle the implementation of law in general and the role of the two branches of national government, namely the executive and the judiciary, in its interpretation and implementation. The Court clearly ruled in favour of the preponderance of the judiciary over the administration in the sense that administrative action may always be challenged in the courts of law. A ruling issued by the judiciary in a Member State of the Convention has precedence over administrative acts. An administrative decision, which runs counter to the established case law of the courts, is not in accordance with domestic law.

CASE OF RAMADHI AND OTHERS V. ALBANIA
(Final Judgment 13 November 2007)

CASE BRIEF

I FACTS

The applicants, all siblings, were born in 1921, 1916, 1927, 1928, 1934 and 1943 respectively and live in Kavaja and Durrës, Albania. During the communist regime, several plots of land and two shops owned by the applicants' father were confiscated by the authorities without payment of compensation. The property, measuring in total 46,000 sq. m (the land) and 150 sq. m (the shops) ("the relevant property"), was situated in the Kavaja region.

The applicants lodged an application with the Kavaja Property Restitution and Compensation Commission ("the Commission") under the Property Act, seeking to have the relevant property returned to them. On 7 June 1995 and 20 September 1996, respectively, the Kavaja Commission upheld the applicants' title as joint owners of the two shops and a plot of land measuring 15,500 sq. m. Not being able to restore the relevant property in its entirety, the Commission ruled that 10,000 sq. m of the relevant property was to be returned to the applicants and that they were entitled to compensation, under the Property Act, in respect of the remaining 5,500 sq. m of land and the shops. Moreover, it decided not to rule on the adjacent plot of land measuring 30,500 sq. m, since agricultural property was outside its jurisdiction: rather, the District Land Commission was the competent body pursuant to the Land Act. In compliance with the Kavaja Commission's decision of 20 September 1996, the applicants took possession of the plot of land measuring 10,000 sq. m.

Notwithstanding the applicants' requests, the authorities had failed to comply with the parts of the Commission's decisions relating to the payment of compensation in respect of the shops and the plot of land measuring 5,500 sq. m.

The applicants lodged an application with the Kavaja Land Commission ("the Land Commission"), attached to the Kavaja Municipality, claiming property rights in respect of the plot of land measuring 30,500 sq. m.

On 11 November 1998, the Land Commission upheld the property claims of applicants Sh. Ramadhi, R. Kapedani and R. Ramadhi ("the first three applicants") and dismissed those of applicants Xh. Ramadhi, D. Ramadhi and N. Ramadhi ("the last three applicants") on the ground that the latter

were ineligible to claim property rights over agricultural land, in so far as they were not resident in the area where the land was located.

The first three applicants entered their ownership of the property in the Land Register.

The Land Commission, further to a request by the Ministry of Justice, declared the first three applicants' titles void on the basis that the decision of 11 November 1998 conflicted with substantive law. The first three applicants initiated proceedings in the Durrës District Court, claiming property rights over the relevant property. On 4 February 2000, the Durrës District Court annulled the Land Commission's decision and ordered it to examine *de novo* the first three applicants' claim to be given title to the plot of land measuring 30,500 sq. m. The Kavaja District Court issued a writ for the enforcement of the judgment of 4 February 2000. The Bailiff's Office ordered the Kavaja Municipality to comply with the District Court's decision of 4 February 2000.

The Kavaja Municipality held that it had no jurisdiction to enforce the decision on the ground that the Kavaja Land Commission, which would originally have had jurisdiction, had been dissolved pursuant to the Instruction by the city's Mayor.

On 8 January 2003, the newly established Kavaja Land Commission upheld the validity of the first three applicants' titles, in compliance with the District Court's judgment of 4 February 2000.

The applicants maintained that the property issue was still unresolved since the local authorities had transferred the above-mentioned plots of land to third parties, wherefore the Commission decision was ineffective in practice. The Government maintained that the applicants had failed to register their title to the relevant property in the Land Register in order to take possession of the property in question and did not comment on the applicants' submission concerning the transfer of the property to third parties.

II LEGAL ISSUES

(1) Whether the authorities' failure to provide for procedures to be followed for the enforcement of the administrative body's (Commission's) decisions had violated the applicants' right of access to a court as guaranteed under Article 6(1) and also amounted to a violation of Article 13 of the Convention.

(2) Whether the authorities' failure to enforce the court's (Kavaja District Court's) judgment for more than seven years had amounted to a violation of Article 6(1) of the Convention.

(3) Whether the authorities' failure to comply with the administrative body's (Commission's) decisions and the court's (Kavaja District Court's) judgment, which left the applicants in a state of uncertainty with regard to the realisation of their property rights and prevented them from enjoying the possession of their money and land for over twelve years, amounted to a disproportionate interference with the applicants' peaceful enjoyment of property within the meaning of Article 1 of Protocol No. 1 to the Convention.

(4) Whether the domestic courts had discriminated against the last three applicants on the ground of their place of residence, in breach of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

III HOLDING (UNANIMOUSLY)

(1) The complaints under Article 6(1) of the Convention, Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention as regards the Commission's decisions of 7 June 1995 and 20 September 1996 are admissible;

(2) The complaints under Article 6(1) and Article 1 of Protocol No. 1 as regards the Kavaja District Court judgment of 4 February 2000 are admissible in respect of the first three applicants and the remainder of the complaints is inadmissible;

(3) There has been a violation of Article 6(1) of the Convention in respect of the failure to enforce the Commission's decisions of 7 June 1995 and 20 September 1996 and the Kavaja District Court judgment of 4 February 2000;

(4) There has been a violation of Article 13 of the Convention in conjunction with Article 6(1) of the Convention in respect of the ineffectiveness of the remedies at the applicants' disposal to secure the enforcement of the Commission's decisions of 7 June 1995 and 20 September 1996;

(5) There has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of all the applicants as regards the plot of land measuring 5,500 sq. m and the shops, and in respect of the first three applicants as regards the plot of land measuring 30,500 sq. m;

(6) The respondent State, within three months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, is to return the plot of land measuring 30,500 sq. m belonging to the first three applicants and to pay them jointly EUR 25,000 in respect of pecuniary and non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable. Failing such restitution, the respondent State is to pay

jointly to the first three applicants, within six months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, EUR 120,000 in respect of pecuniary and non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable;

(7) The respondent State is to pay jointly to all the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable: (i) EUR 64,000 in respect of pecuniary and non-pecuniary damage relating to the plots of land measuring 5,500 sq. m and 150 sq. m; (ii) EUR 1,676 in respect of costs and expenses;

(8) The remainder of the applicants' claim for just satisfaction is dismissed.

IV REASONING

(a) Reasons why the Court found a violation of Article 13 in Conjunction with Article 6(1)

1. Admissibility

The applicants complained of the authorities' failure to effectively enforce three final decisions given in their favour. Moreover, they complained about the lack of remedies to enforce the Commission's decisions awarding them compensation. They relied on Article 6(1), and Article 13 of the Convention.

With respect to the non-enforcement of the Commission's decisions of 7 June 1995 and 20 September 1996 concerning the payment of compensation for a prolonged period of time, the Government advanced that the guarantees enshrined in Article 6 had not been applicable to the enforcement of decisions which, according to domestic law, had not been final and binding, as had been the case with the Commission's decisions. Consequently, the Government argued that the complaint should be declared inadmissible.

After recalling the principles of its case-law with respect to the notion of "dispute", under the "civil" limb of Article 6(1), the Court noted that, in the present case, it had not been contested that there was a "dispute" over a right recognised under domestic law, that the dispute had been genuine and serious or that the outcome of the proceedings had been directly decisive for the right concerned. It further observed that the dispute had related to a right which was civil by its very nature, since it was between the State and

the applicants as to the determination of the latter's property rights under the Property Acts. Through the competent Commission's decisions at issue, the State had recognised that the applicants had been entitled to receive compensation. Notwithstanding the fact that domestic law had omitted to specify a time for their becoming final, the Court observed that, after more than twelve years, the merits of such decisions had not been challenged before any court and, in law, wherefore nothing prevented their immediate enforcement. Consequently, the Court found the rights, which had thus been generated, to be final and enforceable, and that the proceedings before the Commission fell within the scope of Article 6(1) of the Convention and it dismissed the Government's objections.

The Court also considered that the complaints under Article 6(1) in conjunction with Article 13 were not manifestly ill-founded within the meaning of Article 35(3) of the Convention. It further found that they had not been inadmissible on any other grounds. Therefore, the Court declared these complaints admissible.

2. Merits

The applicants argued that the authorities' failure to provide for procedures to be followed for the enforcement of the Commission's decisions had violated their right of access to a court as guaranteed under Article 6(1) and also amounted to a violation of Article 13 of the Convention.

After recalling the principles of its case-law under Articles 6(1) and 13, the Court observed that, irrespective of whether the final decision to be executed took the form of a court judgment or a decision by an administrative authority, domestic law, as well as the Convention, provided that it had to be enforced; and, that no steps had been taken to enforce the Commission's decisions in the applicants' favour.

The Court noted that none of the Property Acts or any related domestic provision had governed the enforcement of the Commission's decisions. In particular, the Property Acts had not provided either for any statutory time-limit for appealing against such decisions before the domestic courts or for any specific remedy for their enforcement. The Court further noted that the Property Acts had left the determination of the appropriate form and manner of compensation to the Council of Ministers, which had had to define the detailed rules and methods for such compensation. No such measures had been adopted and the Government had proffered no explanation for this.

The foregoing considerations, as well as the fact that the restitution of property and the payment of appropriate compensation had not led to the

enforcement of the decisions in the applicants' favour for 12 and 11 years were sufficient to enable the Court to conclude that, by failing to take the necessary measures to provide for the means to enforce the Commission's decisions, the applicants had been deprived of their right to an effective remedy enabling them to secure the enforcement of their civil right to compensation. The Court therefore dismissed the Government's objections and found a violation of Article 13 in conjunction with Article 6 (1).

(b) Reasons why the Court found a violation of Article 6(1) of the Convention

1. Admissibility

The applicants complained about a violation of Article 6(1) given the authorities' failure to enforce in practice the Kavaja District Court's judgment of 4 February 2000 ordering the issuance of a decision on their property rights.

The Court noted that the applicants' complaint under this head concerned the failure to enforce the District Court's judgment. Since only the first three applicants had been parties to the proceedings at issue, the Court considered that the last three applicants had not demonstrated that they could claim to be victims of a failure to enforce the above-mentioned judgment.

The Court considered that the Government's objection concerning the first three applicants' victim status, namely that they had failed to take the necessary administrative steps to enter their titles in the Land Register and accordingly to claim possession of the property, was related to the merits of their complaint and that both questions should be examined together on the merits.

After finding that the first three applicants' complaint under this head was not manifestly ill-founded within the meaning of Article 35(3) of the Convention, and that it was not inadmissible on any other grounds, the Court declared it admissible.

2. Merits

The first three applicants submitted that the District Court's judgment had not been enforced for more than seven years. The Government argued that the authorities could not be held responsible for the non-enforcement of the above-mentioned decision since its execution depended upon the applicants taking the appropriate steps, namely bringing an action seeking the entry of their titles in the Land Register.

After recalling the principles of its case-law concerning the non-enforcement of final judgments, the Court observed that the District Court had ordered the issuance of a fresh decision on the first three applicants' property claims. After two years of inactivity, the Land Commission upheld their title to three specific plots of land by which date the land was owned by third parties.

Finding that the State had not discharged the onus on it to prove the effectiveness of the remedies invoked and noting that the first three applicants' property rights were far from being determined, the Court found that the State authorities had failed to enforce the District Court's judgment. The Court therefore dismissed the Government's objections and found a violation of Article 6(1) of the Convention as regards the first three applicants.

(c) Reasons why the Court found a violation of Article 1 of Protocol No. 1 to the Convention

1. Admissibility

The applicants complained of a violation of their property rights over the relevant property. They relied on Article 1 of Protocol No. 1 to the Convention. The Government contested that argument.

After reiterating under what conditions claims could be considered "possessions" for the purposes of Article 1 of Protocol No. 1, the Court noted that the complaint was linked to those examined under Article 6(1) in relation to the authorities' failure to enforce the decisions given in the applicants' favour. Since the Court had declared inadmissible the last three applicants' complaint as regards the non-enforcement of the judgment of Kavaja District Court, these applicants had no "legitimate expectation", based either on the provisions of the Land Act or on the decisions given in relation to their claim for restitution of the plot of land measuring 30,500 sq. m. Accordingly, the Court declared the last three applicants' complaint about the Kavaja District Court's judgment incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) and rejected it in accordance with Article 35(4).

However, the first three applicants' complaints under Article 1 of Protocol No. 1 as regards the failure to enforce the judgment of the Kavaja District Court and all the applicants' complaint as regards the failure to enforce the Commission decisions of 1995 and 1996 were not, according to the Court, manifestly ill-founded within the meaning of Article 35(3) of the Convention. Since they were not inadmissible on any other grounds either, the Court declared them admissible.

2. Merits

After recalling the principles of its case-law under Article 1 of Protocol No. 1, the Court observed that the interference with the applicants' right to the enjoyment of their possessions stemmed from the continuing failure to pay them the compensation based on the Commission's decisions and to return to the first three applicants the property of which they had been recognised as the owners by the Land Commission. Taking into account the circumstances of the present case, the Court considered that the interference fell to be examined under the first sentence of the first paragraph of Article 1 of Protocol No. 1, laying down the principle of peaceful enjoyment of property in general terms.

Consequently, the Court proceeded with establishing whether a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the circumstances of the instant case, the Court was called upon to determine whether the time necessary for the domestic authorities to pay the applicants compensation and to effectively return to the first three applicants the properties, to which they had been entitled, had disturbed that balance and whether it had placed an excessive burden on them.

The Court reiterated that States had a wide margin of appreciation to determine what was in the public interest, especially where compensation for nationalisation or expropriation was concerned, as the national legislature had a wide discretion in implementing social and economic policies. However, that margin of appreciation was not unlimited and its exercise was subject to review by the Convention institutions.

In the present case, twelve and eleven years had passed since the Commission's decisions of 1995 and 1996 respectively without the applicants having been paid any compensation. Moreover, the situation arising from the combination of the sale of the relevant property (measuring 30,500 sq. m) and the Land Commission's decision of 8 January 2003 had the effect of depriving the applicants of the benefit of the enforcement of that decision.

The Court considered that, by failing to comply with the Commission's decisions of 1995 and 1996 and the Kavaja District Court's judgment of 4 February 2000, the national authorities had left the applicants in a state of uncertainty with regard to the realisation of their property rights. Furthermore, the authorities had prevented them from enjoying the possession of their money and land for a considerable period of time.

In the light of all the circumstances, the Court found a violation of Article 1 of Protocol No. 1 as regards all the applicants in respect of the issue of compensation and as regards the first three applicants in respect of the issue of restitution.

(d) Reasons why the Court rejected the complaint under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

The last three applicants complained that the domestic courts had discriminated against them on the ground of their place of residence, in apparent breach of their property rights. They relied on Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

The Court observed that, in its decision of 11 November 1998, the Land Commission dismissed the claims of the last three applicants on the ground that they had not been resident in the region where the relevant property they had been claiming had been situated. The applicants had failed to appeal against that decision. The Court considered that by failing to raise the issue of their discrimination with the domestic courts, the applicants had failed to exhaust domestic remedies for the purposes of Article 35(1). Consequently, the Court rejected the complaint in accordance with Article 35(1) and (4) of the Convention.

(e) Application of Article 46 of the Convention

On the basis of a dozen of identical applications before it, the Court concluded that the violation of the applicants' rights guaranteed by Article 6(1) of the Convention and Article 1 of Protocol No. 1 had originated in a widespread problem affecting large numbers of people. It was the unjustified hindrance of their right to the peaceful enjoyment of their property, stemming from the non-enforcement of the Commission' decisions awarding them compensation under the Property Act. The escalating number of applications was, in the Court's view, an aggravating factor as regards the State's responsibility under the Convention and also a threat for the future effectiveness of the system put in place by the Convention, since the legal vacuums detected in the applicants' particular case could subsequently give rise to other numerous well-founded applications.

Before examining the applicants' individual claims for just satisfaction under Article 41 of the Convention and in view of the circumstances of the instant case, the Court decided to consider what consequences could be drawn for the respondent State from Article 46 of the Convention. After recalling

that, under Article 46, the High Contracting Parties had undertaken to abide by the final judgments of the Court in any case to which they had been parties, the Court noted the effects of such an obligation. In that respect, the Court pointed out that, where it found a violation, the respondent State had a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The Court specified that the national authorities had the task of taking – retrospectively if needed – the necessary measures of redress in accordance with the principle of subsidiarity under the Convention, so that the Court did not have to reiterate its finding of a violation in a long series of comparable cases.

The Court also noted that it was not for it to determine what could be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention. However, the Court maintained that it was its concern to facilitate the rapid and effective suppression of a malfunctioning which had been found in the national system of human-rights protection. In that connection and having regard to the systemic situation which it had identified in the present judgment, the Court considered that general measures at the national level were undoubtedly called for in its execution.

In order to assist the respondent State in complying with its obligations under Article 46, the Court attempted to indicate the type of measures that the Albanian State could take in order to put an end to the nature and cause of the breaches which had been found in the present case. It considered that the respondent State should, above all, introduce a remedy which secured genuinely effective redress for the Convention violations identified in the instant judgment, as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Articles 6(1) and 13 of the Convention and Article 1 of Protocol No. 1. The Court also noted that, by introducing the relevant remedy, the State should, *inter alia*, designate the competent body, set out the procedural rules, ensure compliance with such rules in practice and remove all obstacles to the award of compensation under the Property Act. It held that these objectives could be achieved by ensuring the appropriate statutory, administrative and budgetary measures. In its view, these measures should include the adoption of the “maps for the property valuation” in respect of those applicants who were entitled to receive compensation in kind and the designation of an adequate fund in respect to those applicants who were

entitled to receive compensation in value, this in order to make it possible for all the claimants having successful Commission's decisions in their favour to obtain speedily the lands or the sums due. And, such measures, the Court stressed, should be made available as a matter of urgency.

(f) Application of Article 41 of the Convention

As regards pecuniary damage, the applicants claimed EUR 590,000 for the plots of land measuring a total of 36,000 sq. m and EUR 65,500 for the shops. Moreover, they left it to the Court's discretion to determine the relevant rate of interest for the period during which the authorities had failed to pay them the compensation due. Lastly, the applicants claimed EUR 12,000 in non-pecuniary damage.

The Government contested the applicants' claims but did not submit any argument relating to the amounts claimed by the applicants. The Government asked the Court to rule that a finding of a violation would constitute in itself just satisfaction.

The Court noted that a judgment, in which it found a breach, imposed on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Court also observed that if the domestic law allowed only partial reparation to be made, Article 41 of the Convention gave the Court the power to award compensation to the party injured by the act or omission that had led to the finding of a violation of the Convention.

The Court recalled that compensation was awarded on the basis of the pecuniary damage (the loss actually suffered as a direct result of the alleged violations) and non-pecuniary damage (reparation for the anxiety, inconvenience and uncertainty caused by the violation) and other non-pecuniary loss. In addition, the Court stressed that if one or more heads of damage could not be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proved difficult, it could decide to make a global assessment.

The Court further reiterated that the most appropriate form of redress in respect of a violation of Article 6 was to ensure that the applicant was, as far as possible, put in the position in which he or she would have been had the requirements of Article 6 not been disregarded. Having regard to the nature of the violations which it had found, the Court considered therefore that the applicants had suffered considerable pecuniary and non-pecuniary damage as a result of the breach of their rights under the Convention, which was

why a finding of a violation alone would clearly not constitute sufficient just satisfaction within the meaning of Article 41.

The Court considered that, in the circumstances of the case, the return of the plots of land measuring 30,500 sq. m as ordered in the Land Commission's decision and the payment of the compensation corresponding to the value of the plots of land measuring 5,500 sq. m and 150 sq. m, at the time of the relevant decisions, together with a measure of interest to reflect the intervening loss of use of the said plots of land, would put the first three applicants and all the applicants, respectively, as far as possible, in a situation equivalent to the one in which they would have been if there had not been a breach of the Convention.

Having regard to the material in its possession and the fact that the Government had not furnished any objection to the method of calculation of the compensation submitted by the applicants and making an assessment on an equitable basis, the Court awarded jointly to all the applicants a lump sum of EUR 64,000 in respect of pecuniary and non-pecuniary damage relating to the plots of land measuring 5,500 sq. m and 150 sq. m.

Moreover, it awarded jointly to the first three applicants a global sum of EUR 25,000 together with the restitution of the plot of land measuring 30,500 sq. m. Failing the restitution of the said plot of land by the respondent State, within three months from the date on which this judgment became final, the Court held that the respondent State was to pay jointly to the first three applicants an amount of EUR 120,000 in respect of pecuniary and non-pecuniary damage relating to that property.

The applicants, who had received EUR 824 in legal aid from the Council of Europe in connection with the presentation of their case, had sought EUR 2,800 and EUR 2,500 for the costs and expenses they had incurred before the domestic courts and before the Court respectively. However, they had not provided a detailed breakdown to substantiate their claim for costs and expenses before the domestic courts.

The Court recalled that, according to its case-law, an applicant was entitled to reimbursement of his costs and expenses only in so far as it had been shown that these had been actually and necessarily incurred and had been reasonable as to quantum.

In the present case, the Court considered it was reasonable to award the sum of EUR 1,676, in addition to the sum already granted in legal aid by the Council of Europe, for costs and expenses incurred in the proceedings before the Court, but dismissed the claim for costs in the domestic proceedings for lack of substantiation.

CASE OF S. A. DANGEVILLE V. FRANCE
(Final Judgment 16 April 2002)

CASE BRIEF

I FACTS

Under the General Tax Code as worded until 31 December 1978, the applicant company was liable to value-added tax (VAT) on its commercial activity. It paid a total of 291,816 French francs (FRF) in VAT on its 1978 transactions. The Sixth Directive of the Council of the European Communities dated 17 May 1977 granted an exemption from VAT for "insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents". That provision was to come into force on 1 January 1978. On 30 June 1978, the Ninth Directive of the Council of the European Communities dated 26 June 1978 was notified to the French State. It granted France an extension of time – until 1 January 1979 – in which to implement the provisions of the Sixth Directive of 1977. Since such directives have no retroactive effect, the Sixth Directive ought nonetheless to have been applied from 1 January to 30 June 1978.

Relying on the Sixth Directive, the applicant company sought reimbursement of the VAT it had paid for the period from 1 January to 31 December 1978, which it considered had not been due as the Ninth Directive had no retroactive effect. It also brought an action in damages against the State for failing to bring French law into line with the Sixth Directive within the prescribed period, thereby causing it to sustain damage equal to the amount of the VAT paid. It claimed reimbursement of the VAT paid or, failing that, the amount attributable to the period from 1 January 1978 to the date the Sixth Directive had come into force.

The Paris Administrative Court dismissed its claims in a judgment of 8 July 1982. It held, *inter alia*, that it was clear from the Treaty of the European Communities that, while the directives placed an obligation on States to achieve a particular result, the choice of the appropriate means of implementing a directive in domestic law lay within the sole discretion of the national authorities, such that individuals and private bodies could not rely directly on a directive to defeat a provision of domestic law.

On 10 June 1982, a claim by another firm of insurance brokers, *S. A. Revert et Badelon*, for the reimbursement of VAT paid on its transactions in 1978 was dismissed by the Paris Administrative Court for the same reasons.

In a further development, the authorities directed in an administrative circular issued on 2 January 1986, that "no further action shall be taken to collect sums remaining due at the date of publication of this circular from insurance brokers who have failed to charge value-added tax on their transactions between 1 January and 30 June 1978 and have received supplementary tax assessments as a result."

In a judgment of 19 March 1986, the *Conseil d'Etat* dismissed an appeal by the applicant company. It held that individuals and private bodies were not entitled to rely on the provisions of a European directive that had yet to be transposed into domestic law and declared the action in damages inadmissible, as the applicant company had omitted to apply in the first instance to the tax authorities.

As the second claim had been dismissed on procedural grounds owing to the applicant company's failure to apply in the first instance to the tax authorities, the applicant company made a further claim for reparation, this time after following the prescribed procedure. To that end, it sent the Minister of the Budget a claim for reparation comprising two limbs on 16 March 1987. In the first, it alleged that the State was at fault for failing to transpose the Sixth Directive into domestic law within the prescribed period and for continuing to apply a provision of French law that no longer complied with Community law. In the second, it argued that the State was strictly liable for failing to maintain an equal distribution of public burdens following the issue of the circular of 2 January 1986.

The claim was rejected by the Minister. An appeal by the applicant company to the Paris Administrative Court was dismissed on 23 May 1989. In a judgment of 1 July 1992, the Paris Administrative Court of Appeal quashed part of the judgment of the Paris Administrative Court. It held that the State had been at fault and ordered it to pay the applicant company compensation for its loss in the sum of FRF 129,845, being the amount of VAT overpaid, together with compound statutory interest. The tax authorities appealed to the *Conseil d'Etat*.

By a judgment of 30 October 1996, the *Conseil d'Etat*, sitting as a full court, quashed that judgment and dismissed all the applicant company's claims. It held that the applicant company was not entitled to seek through an action in damages a remedy it had been refused in tax proceedings in a decision that gave rise to an estoppel by record, namely the judgment of 26 February 1986.

On the same day, the *Conseil d'Etat* delivered judgment on an appeal lodged on 23 August 1982 by *S. A. Revert et Badelon* against the Paris Administrative Court's judgment of 10 June 1982. The *Conseil d'Etat* did not follow the line it had taken in its judgment of 26 February 1986 in the applicant company's

case, but instead declared *S. A. Revert et Badelon*'s appeal on points of law admissible, holding that the company was entitled to rely on the provisions of the Sixth Directive and should be granted a release from the contested tax liability – for which there was no statutory basis as the statutory provisions conflicted with the objectives of the Directive – for the sums erroneously paid for the period from 1 January to 30 June 1978.

II LEGAL ISSUES

(1) Whether the applicant's company claim against the State for the VAT paid in error was of a nature to constitute an asset and therefore amounted to a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1.

(2) Whether the difference of treatment between the applicant's company and other companies that had not paid the VAT, against which the proceedings were abandoned by the administrative circular, as well as the difference of treatment between the applicant's company and another company in an identical situation, whose claims against the State for the VAT paid in error were honoured, amounted to a violation of the prohibition of discrimination, protected under Article 14.

III HOLDING (UNANIMOUSLY)

(1) As to the first legal issue, there has been a violation of Article 1 of Protocol No. 1 of the Convention;

(2) As to the second legal issue, no separate examination of the complaint of a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 is necessary;

(3) The finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;

(4) The respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44(2) of the Convention, the following amounts: EUR 21,734.49 in respect of pecuniary damage and EUR 21,190.41 in respect of costs and expenses.

IV REASONING

(a) Reasons why the Court found a violation of Article 1 of Protocol No. 1

In accordance with its longstanding case-law, the Court addressed the complaint under Article 1 of Protocol No. 1 by first examining the existence

of possessions within the meaning of Article 1 of Protocol No. 1. The Court found that the applicant company had had a valid claim against the State when it had lodged its two appeals for the VAT paid in error for the period from 1 January to 30 June 1978. The Court held that a claim of that nature had "constituted an asset" and therefore had amounted to a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. Furthermore, the Court considered that the applicant company had had at least a legitimate expectation of being able to obtain the reimbursement of the disputed sum.

In reaching this conclusion, the Court took into account that, by requiring payment of VAT on transactions negotiated by insurance brokers during the period from 1 January to 30 June 1978, the French legislation had been incompatible with the provisions of the Sixth Directive of the Council of the European Communities of 17 May 1977, which had been directly applicable from 1 January 1978 for the period concerned. In support of this argument, the Court referred to the Sixth and Ninth Directives, the relevant case-law of the Court of Justice of the European Communities (CJEC), the administrative circular of 2 January 1986 and the terms of the *Conseil d'Etat*'s judgment of 30 October 1996 in *S. A. Revert et Badelon*. The Court further noted that the *Conseil d'Etat* had been willing to verify the compatibility of French norms with international norms since 1989. The Court also had regard to the fact that the applicant company had paid VAT for the period from 1 January to 30 June 1978, and that the Administrative Court of Appeal had found in favour of the applicant company on 1 July 1992 in the second set of proceedings.

After establishing the existence of possessions within the meaning of Article 1 of Protocol No. 1, the Court considered whether there was an interference and the applicable rule. In that respect, the Court recalled that Article 1 of Protocol No. 1 comprised three distinct rules: "The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule."

Going back to the facts of the case, the Court also recalled that *Conseil d'Etat*'s judgment of 30 October 1996 had deprived the applicant company

of its right to have its claim for reimbursement of the amount it had overpaid in VAT examined. The Court further noted that in its first judgment of 26 February 1986, the *Conseil d'Etat* had refused to uphold the applicant company's claim, notwithstanding the provisions of the Sixth Directive and of the administrative circular of 2 January 1986, which exempted insurance brokers from the obligation to pay VAT for the period from 1 January to 30 June 1978. In that connection, it is noteworthy that the administrative circular concerned only taxpayers, who had received a supplementary tax assessment for failing to pay the VAT in issue. In the Court's view, those decisions entailed an interference with the right which the applicant company was entitled to assert under Community law and the applicable administrative circular for the reimbursement of debt and, consequently, with the right of all persons, and in particular the applicant company, to the peaceful enjoyment of their possessions.

The Court noted that the applicant company complained that it had been deprived of its possessions within the meaning of the second sentence of the first paragraph of Article 1. Without disregarding that an interference with the exercise of claims against the State could constitute such a deprivation of possessions, the Court nevertheless observed that, in respect of the payment of a tax, a more natural approach might be to examine the complaints from the angle of a control of the use of property in the general interest "to secure the payment of taxes", which fell within the rule in the second paragraph of Article 1.

The Court, however, did not consider it necessary to decide this issue, since the two rules were not "distinct" in the sense of being unconnected. Being only concerned with particular instances of interference with the right to peaceful enjoyment of property, they were, in its view, to be construed in the light of the principle enunciated in the first sentence of the first paragraph. The Court therefore examined the interference in the light of the first sentence of the first paragraph of Article 1.

When it examines whether an interference was justified, for the purposes of the first sentence of the first paragraph of Article 1, the Court determines whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The Court considered that the administrative circular of 2 January 1986 was intended to bring domestic law into line with the relevant provisions of the Sixth Directive of 1977. That, in the Court's view, is clearly a legitimate objective consistent with Article 1 of Protocol No. 1.

With regard to the judgments of the *Conseil d'Etat*, the Court noted that the Government's case had been based on the application of an established jurisprudential principle, namely the "classification of remedies" rule. The Government argued that "classification of remedies" rule, which prevented a party from bringing an action under the general law of tort for a remedy it had been refused under a special procedure, was justified by the fact that without such a rule, there was a risk of identical situations being treated differently and of a direct breach of the *res judicata* principle. In other words, the rule prevents a claim being brought under the general law of tort for a remedy that has previously been refused in a special form of action.

The Court rejected this argument pointing out that the procedural rule regarding the "classification of proceedings" could not cause a substantive right created by the Sixth Directive to disappear. The *Conseil d'Etat*'s particularly strict interpretation of that procedural rule deprived the applicant company of the sole domestic procedure that was capable of affording it a sufficient remedy to ensure compliance with the provisions of Article 1 of Protocol No. 1. Furthermore, the Court could not discern any other reason that could serve to justify on general-interest grounds the *Conseil d'Etat*'s refusal to give effect to a directly applicable provision of Community law.

Furthermore, the Court observed that the interference had resulted not from any legislative intervention, but, on the contrary, from the legislature's failure to bring the domestic law into line with a Community directive, such that the relevant administrative courts were forced to rule on that issue.

Moreover, the Court noted that the domestic authorities appeared to have had difficulty in comprehending Community law, a fact that had been, incidentally, confirmed by the *Conseil d'Etat*'s reference in its *S. A. Revert et Badelon* decision to "[the] failure [of the French authorities] to enact provisions that were consistent with the objectives of the Sixth Directive on time". Thus, the administrative circular bringing French law into line with the Sixth Directive had not been issued until 2 January 1986 – more than seven years after the Ninth Directive had been notified to the French State, and, in any event, it concerned only those taxpayers who had refused to the pay the VAT concerned.

In the light of the foregoing, the Court found that the interference with the applicant company's right to the peaceful enjoyment of its possessions had not been required in the general interest.

After having established that the interference with the applicant company's right to the peaceful enjoyment of its possessions had not been required

in the general interest, the Court examined whether a fair balance had been struck between the competing interests. The Court considered that, in the instant case, the interference with the applicant company's right to the peaceful enjoyment of its "possessions" had been disproportionate: "Both the negation of the applicant company's claim against the State and the absence of domestic procedures affording a sufficient remedy to ensure the protection of the applicant company's right to the peaceful enjoyment of its possessions upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." Consequently, the Court found a violation of Article 1 of Protocol No. 1.

(b) Reasons why the Court decided not to consider the complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

The applicant company alleged a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. It submitted that, by adopting the administrative circular abandoning proceedings against companies that had not paid the VAT, the authorities had been guilty of discrimination by giving those, who had defaulted on their tax, an advantage over law-abiding taxpayers, and that discrimination had been compounded by the authorities' failure to take action to refund the sums which the law-abiding taxpayers had paid in error.

The applicant company argued that the administrative circular had not pursued a legitimate aim and that the means used were not reasonably proportionate to the aim pursued. If the purpose of the administrative circular had been to transpose the Sixth Directive of 1977 into domestic law, there was no justification for the difference in treatment between the companies concerned by the Sixth Directive. The companies that had voluntarily paid the VAT, even though it had been levied unlawfully, had not received any benefit in exchange.

Lastly, the applicant company contended that it had received less favourable treatment than *S. A. Revert et Badelon*. Both companies had paid the same tax, made an initial claim for a refund, appealed to the administrative court and, following the dismissal of their claims, lodged almost simultaneous appeals to the *Conseil d'Etat* in 1982. The *Conseil d'Etat* reached different decisions in the two cases, notwithstanding the fact that the legal position of the two companies was identical, the sole difference being that the *S. A. Revert et Badelon* case file had been mislaid by the *Conseil d'Etat* for

several years. The appeal by *S. A. Revert et Badelon* was not heard until ten years after the applicant company's and it benefited from favourable developments in the case-law.

In the light of its finding that the interference with the applicant company's right to the peaceful enjoyment of its "possessions" had been disproportionate and that there had been a violation of Article 1 of Protocol No. 1, the Court considered that no separate examination of this complaint was necessary.

(c) Application of Article 41 of the Convention

The applicant company sought payment of the sum of FRF 291,816, being the amount of VAT it had paid for the year 1978.

The Court found that the most suitable form of reparation of pecuniary damage would be reimbursement of the VAT that was unduly paid for the period from 1 January to 30 June 1978. As to the sums which the Government said should have been deducted from the VAT paid for 1978, the Court noted, firstly, that it had not been clearly demonstrated that employment tax, which it would have had to pay had it enjoyed an exemption from VAT, would have been payable and that, in any event, it was impossible to calculate the amount. Secondly, the applicant company produced witness statements that showed that, owing to the nature of its activity, it could not have passed on the VAT to its customers. Above all, the Court observed that it had not been alleged, still less demonstrated, that such amounts had been claimed from *S. A. Revert et Badelon* by way of set-off after its successful appeal to the *Conseil d'Etat*. Nor was there any reference in the *Conseil d'Etat*'s judgment to any obligation to deduct certain sums from the amount of the VAT that was to be refunded. The applicant company had furnished documents showing that the amount of VAT for the period in issue came to FRF 142,568.09, that is to say EUR 21,734.49. In the light of the foregoing, the Court awarded that sum to the applicant company for pecuniary damage.

The applicant company sought payment of FRF 139,000 net of tax, that is to say EUR 21,190,41, for the costs and expenses it had incurred in the Administrative Court, the Paris Administrative Court of Appeal, the *Conseil d'Etat* and the European Court of Human Rights.

As regards the amount of the applicant company's claim, the Court found that it had been substantiated. Accordingly, the Court awarded the applicant company EUR 21,190.41 for costs and expenses.

CASE OF GUISO-GALLISAY V. ITALY
(Judgment of 22 December 2009, Just Satisfaction)

CASE BRIEF

I FACTS

The facts of the case are not exposed in full in this Grand Chamber judgment, because they were detailed in the Chamber judgment preceding it. The applicants complained under Article 1 of Protocol No. 1, claiming they had been deprived of their property. The Chamber found a violation of that provision, but concluded that the question of applying Article 41 of the Convention was not ripe for decision.

That particular issue was later on relinquished to the Grand Chamber. Therefore, the only problem the Court had to deal with in this judgment was just satisfaction under Article 41 of the Convention.

Namely, relying on Article 41 of the Convention, the applicants claimed a sum corresponding to the value of the land in issue, less the compensation received at the national level, plus the value of the buildings erected on their land. They also claimed an amount in reimbursement of the tax, deducted at source, payable on the sums awarded by the Nuoro District Court on 14 July 1997. Finally, they requested compensation for non-pecuniary damage and reimbursement of the costs incurred before the national courts and before the Court.

The most important fact of the case is that it concerns two specific institutions of Italian law, notably, expedited possession of land and constructive expropriation. Expedited expropriation of land enables the authorities to occupy a plot of land and build on it prior to its official expropriation. For that purpose, the authorities may issue an expedited possession order, the validity of which must not exceed five years. The authorised occupation of land creates for its owner an entitlement to compensation for occupation. There is an immediate right of access to a court for the purpose of claiming compensation.

One of the most important questions concerning the pattern of expropriation described above, which is called constructive, or sometimes indirect expropriation, is whether the mere fact that the work had been carried out according to an expedited expropriation order meant that the owner of the land had lost his title. The Italian law was not fixed in that respect until 1983, when the Court of Cassation gave a landmark ruling on the issue. It held that

the mere occupation of land having taken place in the public interest was not capable of transferring the title of the land to the State.

II LEGAL ISSUES

The case involved the claims for pecuniary damage and the application of Article 41 of the Convention, which reads:

> *If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party*.

The key issues for the Court to decide in this case were:

(1) What was the amount of compensation for constructive expropriation?

(2) Which is the relevant moment in time for assessing the damage suffered in a case of indirect, or constructive expropriation?

III HOLDING

(1) The respondent State is to pay the applicants jointly, within three months, the following amounts:

  (i) EUR 2,145,000 plus any tax that may be chargeable, in respect of pecuniary damage (by sixteen votes to one);

  (ii) EUR 45,000 EUR, plus any tax that may be chargeable, in respect of non-pecuniary damage (unanimously);

  (iii) EUR 35,000 for costs and expenses, plus any tax that may be chargeable to the applicants (unanimously);

(2) The remainder of the claim for just satisfaction is dismissed (by sixteen votes to one).

IV REASONING

The crucial legal issue in this case was the amount of compensation for constructive expropriation. Under the Court of Cassation's 1983 case-law on constructive expropriation, compensation in full, in the form of damages for the deprivation of the land, was due to the owner in consideration for the loss of ownership entailed by the unlawful occupation. The ECtHR took the same view in its judgments in other Italian cases concerning constructive

expropriation. In this regard, the Court made reference in paragraph 39 to its judgments in *Belvedere Alberghiera S.r.l. v. Italy*[365] and *Carbonara and Ventura v. Italy*[366]. The amount due in case of an indirect expropriation depended on which was the relevant moment in time for assessing the pecuniary damage suffered.

The understanding of the Court's holding in this case and its importance for the development of its case-law become clear in the light of the attitude to the determination of the amount to be awarded to the applicants in just satisfaction expressed in the Chamber judgment. That particular issue was relinquished to the Grand Chamber, which in this case abandoned the Court's usual method of determining its award under Article 41 of the Convention. The usual method relied on the market value of the expropriated land, adjusted for the inflation and increased by the appreciation brought about by the buildings erected by the expropriating authority.

The Grand Chamber adopted another approach to the issue and introduced a new method, based on the market value of the property on the date on which the applicants established with legal certainty that they had lost the right of ownership of the land in question. That amount was to be increased by the interest due on the date on which the Court adopted its judgment. The Grand Chamber awarded EUR 1,803,374 to the applicants.

The parties disagreed on the amount of just satisfaction. The applicants referred to *Scordino v. Italy*,[367] the case in which the usual method had been applied. They claimed either the restoration of land accompanied by a payment of 2.7 million EUR for the loss of its enjoyment, or the payment of 6.7 million EUR in their favour, in case the plot of land would not be restored to them. In their view, the latter amount was equivalent to the value of the expropriated land in 2009, plus the construction costs of the buildings erected on the land by the State.

The respondent Government contested the application of the rule developed in *Papamichalopoulos and Others v. Greece*,[368] in which the Court held that just satisfaction should follow the idea of *restitutio in integrum*. In its view, the facts in *Papamichalopoulos* differed from those in the case at hand. Therefore, the two cases were to be distinguished. The Government put forward that (a) in *Papamichalopoulos* there was no legal basis for the authorities' action from the outset, and (b) the Greek government had not

365 *Belvedere Alberghiera S.r.l. v Italy*, App. no. 31524/96, Judgment of 30 May 2000.
366 *Carbonara and Ventura v Italy*, App. no. 24638/94, Judgment of 30 May 2000.
367 *Scordino v Italy (No 3),* App. no. 43662/98, Judgment of 6 March 2007.
368 *Papamichalopoulos and Others v. Greece,* App. no. 14556/89, Judgment of 24 June 1993.

offered any compensation whatsoever. The Government of Italy proposed to pay the amount of EUR 900,000, and objected that the Court's adherence to the method it had applied in the previous cases would lead to the applicants' unjust enrichment.

The Grand Chamber drew its conclusions departing from the idea that there was a general obligation of the State to restore as far as possible the situation existing before a breach of the Convention had been committed. The concept was the one of *restitutio in integrum*.

The following marked the Court's assessment in this case. Firstly, the Grand Chamber concluded that it was impossible to equate lawful expropriation and constructive expropriation. Secondly, the Grand Chamber found that the restitution of land was not possible in the instant case. It went on to summarise the Court's case law.

The Grand Chamber stated that the rule in *Papamichalopoulos* had been followed in *Belvedere Alberghiera* and *Carbonara and Ventura*, as well as in *Scordino v. Italy (No. 1)*.[369] That case-law had been confirmed in *Scordino (No. 3)*, cited above, and in *Pasculli v. Italy*.[370] The Grand Chamber decided to raise the question of principle whether the Court's case-law was appropriate.

Considering the appropriateness of the Court's case-law and its possible change, the Grand Chamber took the stand that the application of the rule in *Papamichalopoulos* to the cases of constructive expropriation "may in itself lead to anomalies." The Court sustained the Government's arguments that the present case was distinguishable from the Greek one. There was expedited procedure in the case at hand and absolutely no legal basis for the authorities' action in *Papamichalopoulos*. Moreover, the Greek Government had not offered any compensation to the applicants, which was not the case with the respondent Government in *Guiso-Gallisay*. Therefore, the application of the rule in *Papamichalopoulos* to the instant case would be inappropriate.

The most important element of the Grand Chamber's reasoning concerned the relevant moment in time for assessing the amount of compensation in cases of constructive expropriation, such as the present one. That moment should not be the one on which the Court delivered its judgment but the one when the applicants lost ownership of the land. The Grand Chamber specified that "automatically assessing the losses sustained by the applicants as the equivalent of the gross value of the buildings erected by the State cannot be

369 *Scordino v. Italy (No. 1),* App. no. 36813/97, Judgment of 29 March 2006.

370 *Pasculli v Italy*, App. no. 36818/97, Judgment of 4 December 2007.

justified". This reasoning seems to be quite convincing and indeed enables the Court to avoid putting too heavy a burden on the respondent State in cases of indirect or constructive expropriation.

Applying the new method, the Grand Chamber found that the applicants had lost the ownership of the land in question in 1982 and partly in 1983. Since the domestic courts in Italy had already evaluated the loss caused by constructive expropriation, and awarded a certain amount to the applicants, that sum should be deducted from the Court's abovementioned award.[371] Finally, the Grand Chamber reached a ruling on the amount based on such calculations.

GRUDIĆ V. SERBIA
(Judgment of 17 April 2012)

CASE BRIEF

I FACTS

The applicants are a married couple. They started receiving disability pensions from the Serbian Pension Fund, Branch Office in Kosovo*, in the 1990s while they lived in Kosovska Mitrovica. In the year 2000, apparently due to the fact that the Serbian government lost control over Kosovo* in 1999, the Pension Fund suspended payment of the applicants' pensions. In May 2003, the applicants claimed from the Serbian authorities to resume payment of the pensions. The only outcome of their move was that the authorities, *i.e.* the Pension Fund issued formal decisions in 2004 and 2005 to justify the suspension of the payment of pensions.

In 2005, the applicants moved from the territory of Kosovo*. They left Kosovska Mitrovica and took residence in Serbia proper, in the city of Novi Pazar. They brought action with the Serbian judiciary against the Pension Fund decisions to suspend payments and won the case in the District Court on 11 July 2006. The Pension Fund appealed on the grounds that the Serbian system of pensions was "pay as you go". In such a system of on-going financing, there were no contributions to the fund from Kosovo*, because of the lack of control of the Serbian state in that region. Therefore, in the administration's view, the Pension Fund was under no obligation to pay pensions to the persons residing in Kosovo*, despite their valid entitlements to receive pensions.

371 For more see Dragoljub Popović, *The Emergence of the European Human Rights Law*, The Hague, Eleven International Publishing, 2011, pp. 106–110.

The Supreme Court of Serbia rejected the appeals on 13 September 2007 and 26 February 2008 and upheld the District Court's abovementioned rulings. However, the Pension Fund disregarded the Supreme Court's judgments in the applicants' cases and, on 3 April 2008, issued new decisions to suspend payment. The decisions were written in such a manner that they "had an appearance of printed templates".

The applicants also submitted, although without evidence, that many persons entitled to receive pensions from the Serbian Pension Fund and residing in Kosovo* "continued receiving their pensions normally". They stated that they had neither applied for a pension in Kosovo*, nor received such a pension. The respondent Government failed to prove the contrary. Finally, the applicants also claimed they had been discriminated against on the basis of their ethnic minority status.

II LEGAL ISSUES

The applicants did not specify their complaint. The Court decided that the application involved consideration of the following legal issues:

(1) Whether there has been a violation of Article 1 of Protocol No. 1.

(2) Whether Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention has been violated.

III HOLDING (UNANIMOUSLY)

(1) The complaints under Article 1 of Protocol No. 1 are admissible, and the remainder of the application is inadmissible;

(2) There has been a violation of Article 1 of Protocol No. 1 to the Convention;

(3) The respondent State is to pay the applicants, EUR 7,000 to each applicant, plus any tax that may be chargeable to them, in respect of non-pecuniary damage and EUR 3,000 to the applicants jointly, plus any tax chargeable to them, in respect of costs and expenses;

(4) The respondent Government must, within six months from the date on which the judgment becomes final in accordance with Art 44(2) of the Convention take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question, it being understood that certain reasonable and speedy factual and/

or administrative verification procedures may be necessary in this regard;

(5) Dismisses the remainder of the applicants' claim for just satisfaction.

IV REASONING

To explain the legal issue in this case, one should start from the question whether a person entitled to receive a pension on the grounds of having contributed by way of subscriptions to a pension fund for years can lose his/her entitlement owing to the place of residence. Another, more important legal issue concerned the possible legal grounds for the administration's refusal to pay the pension to a person entitled to receive it. The latter issue appears to be crucial in the light of the functioning of the legal system of a Council of Europe Member State, or in other words, in respect of the rule of law in the respondent State.

The applicants resided in Kosovo* and, indeed, they could enjoy rights under the Kosovo* regulations, entitling "all persons habitually residing" in Kosovo* to a basic pension. However, the respondent Government was unable to prove that the applicants had indeed enjoyed that right until 2005, when they left Kosovo*.

An issue related to the previous one concerns the regulation of the situation in respect of pensions after the disintegration of Yugoslavia. The standpoint of Serbian law on the issue was fixed in a Supreme Court's Civil Division Advisory Opinion, which envisaged the reassessment of pensions of pensioners who had, by virtue of the legislation in the successor states, secured another pension.

Another important issue was the interpretation of law in general, as well as the preponderance of the judiciary over the other two branches of government. In that respect, the constant and fixed case law of the Constitutional Court of Serbia was clear – it held that opinions and instructions of the government ministries could by no means amount to legislation.

As noted, the applicants did not specify their complaint. The Court, being the master of characterisation, decided to take cognisance of the case under Article 1 of Protocol No. 1 to the Convention. The legal issues, raised under that provision, can be summarised in the form of the following questions:

(1) Were the applicants entitled to receive their pensions from the Serbian Pension Fund?

(2) Were the Serbian authorities entitled to refuse payment of pensions to certain classes of pensioners with regard to their place of residence?

1. Admissibility

The Court rejected the Government's objection that the applicants could have applied for the reopening of their cases with the Pension Fund. It held that the burden of proving the effectiveness of a remedy lay with the Government. Merely stating that the cases could have been reopened in the administrative proceedings did not prove any prospect of success; besides, the applicants had already received administrative decisions, which were overturned by the domestic courts.

The Court also rejected the Government's stance that payment of pensions to all persons, in a situation such as the applicants', should be suspended "on the basis of the Opinion of the Ministry for Social Affairs of 7 March 2003" and a subsequent Opinion of another ministry dated 18 June 2004. The Government's argument was that there was no collection of pension insurance, *i.e.* no subscriptions, from the territory of Kosovo*.

2. Merits

As to the merits, the applicants stated that the administration ignored the national courts' rulings. They objected to the argument invoked by the Government in respect of the "pay as you go" system, claiming that, if such a way of reasoning were followed, pensions should not have been paid at all across the country, since numerous companies failed to contribute to the Pension Fund. The companies that were not successful in doing business often withheld their subscriptions to the Pension Fund in order to cut expenses. Besides, the applicants have not been residents of Kosovo* since 2005.

The Government invoked the fact that many documents concerning pensions had been destroyed in the 1999 air strikes, and conceded that the Pension Fund continued paying pensions to the internally displaced persons originating from Kosovo* and, exceptionally, even to some Kosovo* residents. The Government expressed a strong suspicion that the applicants were receiving pensions from the competent international institutions in Kosovo*.

Ruling on the merits of the case, the Court first noted that the Contracting Parties to the Convention enjoyed a considerable margin of appreciation in the area of social legislation. However, when applying the provisions of such

legislation, they are under the obligation to strike a fair balance between public and private interests. The Court's main finding was that the impugned suspensions of payment of the pensions "were based on the Opinions of the two Ministries, issued on 7 March 2003 and 18 June 2004". The Constitutional Court of Serbia held that "such opinions do not amount to legislation".

The Court went on to apply Article 1 of the Protocol No. 1 to the Convention. In terms of that provision, the refusal of payment of pensions to the applicants amounted to interference with their assets, consisting of their rights and entitlements to receive pensions. In the Court's view, since the interference was based on the ministries' opinions contradicting the case law of the Constitutional Court, as well as the Supreme Court's rulings, it clearly was not in accordance with the relevant domestic law. In other words, the interference with the applicants' property was not lawful. For that reason, the Court found a violation of Article 1 of the Protocol No. 1 and ruled in the applicants' favour, as mentioned above.

III LIST OF ECTHR CASES CITED IN THE CHAPTER

Anheuser-Busch Inc. v. Portugal, 73049/01 (2007)

Beyeler v. Italy [GC], 33202/96 (2000)

Brumărescu v. Romania [GC], 28342/95 (1999)

Former King of Greece v. Greece, 25701/94 (2000)

Gratzinger and Gratzingerova v. the Czech Republic [GC], 39794/98 (2002)

Handyside v. the United Kingdom, 5493/72 (1976)

Hentrich v. France, 13616/88 (1994)

Holy Monasteries v. Greece, 13092/87 and 13984/88 (1994)

Iatridis v. Greece, 31107/96 (1999)

James and Others v. the United Kingdom, 8793/79 (1986)

Kopecký v. Slovakia [GC], 44912/98 (2004)

Kozacioglu v. Turkey, 2334/03 (2009)

Lithgow and Others v. the United Kingdom, 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, and 9405/81 (1986)

Marckx v. Belgium, 6833/74 (1979)

Melnychuk v. Ukraine, 28743/03 (2005)

Papamichalopoulos v. Greece, 14556/89 (1993)

Pine Valley Developments Ltd and Others v. Ireland, 12742/87 (1991)

Potomska and Potomski v. Poland, 33949/05 (2011)

Ramadhi and Others v. Albania, 38222/02 (2007)

S. A. Dangeville v. France, 36677/97 (2002)

Sporrong and Lönnroth v. Sweden, 7151/75 and 7152/75 (1982)

Stran Greek Refineries and Stratis Andreadis v. Greece, 13427/87 (1994)

Suljagic v. Bosnia-Herzegovina, 27912/02 (2009.

Tre Traktörer Aktiebolag v. Sweden, 10873/84 (1989)

Turgut v. Turkey, 1411/03 (2008)

Van Marle and Others v. the Netherlands, 8543/79, 8674/79, 8675/79, and, 8685/79 (1986)

Chapter 6: RIGHT TO FREE ELECTIONS UNDER ARTICLE 3 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 3 OF PROTOCOL NO. 1
Right to free elections

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

I INTRODUCTION

This Chapter deals with the right to free elections as protected under Article 3 of Protocol No. 1 to the Convention. It starts with general observations about the nature of the right to free elections and its relationship with the other Convention provisions. The central parts of the Chapter present the scope of the right to free elections, together with the conditions under which it may be restricted, as they have been developed by the Court. To illustrate its reasoning and to show the principles on which the right to free elections is based in its case-law, the Chapter also provides readers with short comments and case briefs of *Alajos Kiss v. Hungary*,[372] *Paunović and Milivojević v. Serbia*,[373] and *Namat Aliyev v. Azerbaijan*.[374]

GENERAL OBSERVATIONS

The right to free elections belongs to the group of political rights enshrined in the Convention, together with the freedom of expression, and the freedom

372 *Alajos Kiss v. Hungary*, App. no. 38832/06, Judgment of 20 May 2010.
373 *Paunović and Milivojević v. Serbia,* App. no. 41683/06, Judgment of 24 May 2016.
374 *Namat Aliyev v. Azerbaijan*, App. no. 18705/06*,* Judgment of 8 April 2010.

of assembly and association. The common characteristic of these rights as political is that they are not principally directed against other legal subjects, but aim at some form of cooperation between the members of a given polity. Affirming the need to interpret the Convention and the Protocols as a whole, the Court has also recognised that there is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms.[375]

However, the right to free elections allows individuals and groups (political parties, in the first place) to be involved in not just any social cooperation, but to participate directly or indirectly in the governing of the polity. More precisely, Article 3 of Protocol No. 1 to the Convention imposes an obligation upon the Member States "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Due to its nature, the right to free elections attracts a wide variety of cases before the Court. Some of them result from administrative law disputes,[376] others belong to the field of constitutional law,[377] and there are those which go beyond these public law concerns and touch upon the political system and identity issues of the given polity.[378]

The complexity of the right to free elections is also manifested in its relationship with other Convention rights, in the first place, the freedom of expression, guaranteed under Article 10 of the Convention. Considered by the Court as a *lex generalis vis-à-vis* other political rights in the Convention system, the infringements of the right to free elections are commonly coupled with the restrictions of the freedom of expression. This will particularly be the case with election campaign issues. Thus, the Court has pointed out that "[F|ree elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system [...] The two rights are inter-related and operate to reinforce each other: [...] freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature" [...]. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely."[379] In line with this

375 *Ždanoka v. Latvia*, App. no. 58278/00, Judgment of 16 March 2006, para. 115

376 *Namat Aliyev v. Azerbaijan*; *Alajos Kiss v. Hungary; Paunović and Milivojević v. Serbia*.

377 *Yumak and Sadak v. Turkey*, App. no. 10226/03, Judgment of 8 July 2008; *Hirst v. the United Kingdom (No. 2)*, no. 74025/01, Judgment of 6 October 2005.

378 *Aziz v. Cyprus*, App. no. 69949/01, Judgment of 22 June 2004; *Sejdić and Finci v. Bosnia and Herzegovina*, App. nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

379 *Bowman v. the United Kingdom*, App. no. 141/1996/760/961, Judgment of 19 February 1998, para. 42.

reasoning, the Court has also held that Article 3 of Protocol No. 1 is a *lex specialis vis-à-vis* the freedom of association, guaranteed under Article 11 of the Convention.[380]

Being closely related to the identity issues of the given polity, the restrictions of the right to free elections are very often accompanied by violations of the prohibition of discrimination, as protected by Article 14 of the Convention and Article 1 of the Protocol No. 12 to the Convention. The Court's position in that respect is that "[A]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes."[381] Hence, the Court has been called upon to decide cases involving discriminatory restrictions of the right to free elections on the basis of, *inter alia*, ethnicity and race,[382] intellectual or mental disabilities,[383] legal status (of a convicted prisoner),[384] and residence and age.[385]

The political nature of the right to free elections has also affected the type of legal protection offered to it. While this right was traditionally protected through an appeal to an electoral commission or to the parliamentary validation commission, there is a tendency in comparative public law towards vesting courts with jurisdiction for post-election disputes. Hence, many complaints of alleged violations of the right to free elections are accompanied by complaints regarding the right to an effective remedy, enshrined in Article 13 of the Convention. Where post-election disputes are subject to review by domestic courts, the Court examines the case solely under Article 3 of Protocol No. 1 to the Convention,[386] and where post-election disputes are not subject to review by domestic courts, the Court delivers a separate examination of the complaint under Article 13.[387]

Finally, precisely due to the aforementioned nature of the right to free elections, the Court has refused to examine the complaints under Article 6 of the Convention, that the domestic judicial proceedings in electoral disputes were unfair and arbitrary. Since Article 6 of the Convention provides that "in the determination of his civil rights and obligations [...] everyone is entitled

380 *Ždanoka v. Latvia*, para. 141.

381 *Hirst v. the United Kingdom (No. 2)*, para. 62.

382 *Sejdić and Finci v. Bosnia and Herzegovina*, paras. 42–50.

383 *Alajos Kiss v. Hungary*, paras. 42–44.

384 *Hirst v. the United Kingdom (No. 2)*, paras. 63–85.

385 *Schindler v. the United Kingdom*, App. no. 19840/09, Judgment of 7 May 2013, paras. 119–123.

386 *Riza and Others v. Bulgaria*, App. nos. 48555/10 and 48377/10, Judgment of 13 October 2015, para. 95.

387 *Grosaru v. Romania*, App. no. 78039/01, Judgment of 2 March 2010, paras. 55–56.

to a fair [...] hearing [...] by [a] [...] tribunal", the Court usually notes that the dispute in issue concerns the applicant's political rights and does not have any bearing on his "civil rights and obligations" within the meaning of Article 6(1) of the Convention.[388]

SCOPE OF THE RIGHT TO FREE ELECTIONS

While nearly all the substantive clauses in the Convention and its Protocols use the phrases "everyone has the right" or "no one shall", Article 3 of Protocol No. 1 begins differently: "The High Contracting Parties undertake". It has sometimes been inferred from this that Article 3 of Protocol No. 1 does not secure individual rights and freedoms. Hence, the Court deemed it necessary to indicate the meaning it ascribed to Article 3 of Protocol No. 1 in *Mathieu-Mohin and Clerfayt v. Belgium*, the first case brought to it under this Article.[389]

According to the Court, the inter-State colouring of the wording of Article 3 of Protocol No. 1 "does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it", as interpreted by the Court, "would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections."[390] Furthermore, the Court has accepted a broader understanding of the nature of the right to free elections. It presupposes not only the idea of an "institutional" right to hold free elections, but also the concept of subjective rights of participation – the "right to vote" and the "right to stand for election to the legislature".[391] Hence, the Court has recognised both the active and passive aspects of the right to free elections.

Since Article 3 of Protocol No. 1 refers to the "free expression of the opinion of the people in the choice of the legislature", the question what was considered by "legislature" was raised very early on in the Court's case-law. The issue was not of theoretical, but of very practical relevance: the rights guaranteed by Article 3 of Protocol No. 1 apply only to the election of the "legislature".

The Court has consistently held that the word "legislature" has to be interpreted in the light of the constitutional structure of the State in question

388 *Namat Aliyev v. Azerbaijan*, paras. 97–99; *Paunović and Milivojević v. Serbia,* paras. 74–76.
389 *Mathieu-Mohin and Clerfayt v. Belgium*, App. no. 9267/81, Judgment of 2 March 1987.
390 *Ibid*., para. 50.
391 *Ibid*., para. 51.

and that it does not necessarily mean only the national parliament.[392] For instance, the Court considered that the 1980 Belgium constitutional "reform vested the Flemish Council with competence and powers wide enough to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian "legislature" in addition to the House of Representatives and the Senate".[393]

Similarly, in *Matthews v. the United Kingdom*, which concerned the absence of elections for the European Parliament in Gibraltar, a dependent territory of the United Kingdom, the Court found that the European Parliament was sufficiently involved in the specific legislative processes leading to the passage of European Community legislation and was also engaged in the general democratic supervision of the activities of the Community, to constitute part of the "legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1.[394]

However, in the Court's view, the power to make regulations and by-laws, which is conferred on the local authorities, is to be distinguished from legislative power, referred to in Article 3 of Protocol No. 1 to the Convention. Hence, the Court considered that Article 3 of Protocol No. 1 was not applicable to the elections for Polish municipal councils, district councils and regional assemblies. In reaching this decision, the Court took into account that Poland was a unitary State and that legislative power was exercised by the *Sejm* and the Senate. As a matter of fact, the municipal councils, district councils and regional assemblies in Poland do not possess any inherent primary rulemaking powers and are the repositories of powers of an administrative nature concerning the organisation and provision of local services.[395]

In the same vein, the Court has considered that the head of state does not constitute part of the "legislature" for the purposes of the right to free elections.[396] However, the Court did not exclude the possibility of applying Article 3 of Protocol No. 1 to presidential elections. Reiterating that this provision enshrined a characteristic of an "effective political democracy", for the ensuring of which regard must not solely be had to the strictly legislative powers which a body had, but also to that body's role in the overall legislative process, the Court pointed out that: "Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or

392 *Ibid.*, para. 53.
393 *Ibid.*
394 *Ibid.*, para. 54.
395 *Molka v. Poland*, App. no. 56550/00, Decision of 11 April 2006.
396 *Paskas v. Lithuania*, App. no. 34932/04, Judgment of 6 January 2011, paras. 71 and 72.

the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a "legislature" within the meaning of Article 3 of Protocol No 1."[397] Nevertheless, the review of conventionality of the elections of the head of state can come into play if the question is raised in the context of interference with the general prohibition of discrimination.[398]

RESTRICTIONS ON THE RIGHT TO FREE ELECTIONS

Another particularity of Article 3 of Protocol No. 1 is that it does not specify conditions under which the right to free elections may be legitimately restricted. Here the Convention differs from Article 10 or Article 11, to which Article 3 of Protocol No. 1 is akin, which stipulate the scope of the protected rights (freedom of expression and freedom of association) in the first paragraphs and the conditions for their limitation in the second paragraphs.

Therefore, the Court found it important to indicate, already in *Mathieu-Mohin and Clerfayt v. Belgium*, that the right to free elections was not absolute. Referring to the *Golder* judgment,[399] the Court affirmed that Article 3 of Protocol No. 1 allowed for the implied limitations. In reaching this conclusion, the Court took into consideration that in the internal legal orders of the Member States, the rights to vote and to stand for election were subjected to conditions that were not in principle precluded under Article 3 of Protocol No. 1. While recognising that they had a wide margin of appreciation in this sphere, the Court also held that it was for it to determine in the last resort whether the requirements of Protocol No. 1 had been complied with.[400]

More precisely, the Court would have to satisfy itself: that the conditions did not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they were imposed in pursuit of a legitimate aim; and that the means employed were not disproportionate.[401]

Coming back to the parallels between the right to free elections and other Convention provisions protecting various forms of civil and political rights, the Court affirmed that, where an interference with Article 3 of Protocol No. 1 was in issue, it "should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs

397 *Ljube Boškoski v. the former Yugoslav Republic of Macedonia*, App. no. 11676/04, Decision of 2 September 2004.

398 *Sejdić and Finci v. Bosnia and Herzegovina*, paras. 52–56.

399 *Golder v. the United Kingdom*, App. no. 4451/70, Judgment of 21 February 1975, para. 38.

400 *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52.

401 *Ibid*.

of Articles 8 to 11 of the Convention, and it should not necessarily base its conclusions under Article 3 of Protocol No. 1 on the principles derived from the application of Articles 8 to 11 of the Convention."[402] The Court found that, because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision was cast in very different terms from Articles 8 to 11 of the Convention: "The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention."[403]

Accordingly, the triple test for examining whether an interference was compatible with the Convention – lawfulness, legitimate aim and necessity of the restriction – prescribed by the second paragraphs of Articles 8 to 11, is not always applied systematically when reviewing complaints under Article 3 of Protocol No. 1.

1. Lawfulness of the Restriction

The Court has recognised that Article 3 of Protocol No. 1 is phrased differently from the other provisions of the Convention and its Protocols – in terms of an obligation imposed on the High Contracting Parties, rather than guaranteeing a specific right or freedom. Unlike other provisions of the Convention, such as Articles 8 to 11, or Article 1 of Protocol No. 1, the text of this provision does not contain an express reference to the "lawfulness" of any measures taken by the State. However, the Court has also held that the rule of law, one of the fundamental principles of a democratic society, was inherent in all the Articles of the Convention and its Protocols. This principle entails, as advanced by the Court, "a duty on the part of the State to put in place a framework of legislation and, as appropriate, subordinate legislation, for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular."[404] Referring to the case-law developed under Articles 10 and 11 of the Convention, the Court reiterated in the context of Article 3 of Protocol No. 1, that the standard of lawfulness "requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee the consequences which a given action may entail".[405]

Hence, the Court found that this condition was not respected in *Krasnov and Skuratov v. Russia*. In that case, the second applicant applied for registration

402 *Ždanoka v. Latvia*, para. 115

403 *Ibid*.

404 *Paunović and Milivojević v. Serbia*, para. 61.

405 *Krasnov and Skuratov v. Russia*, App. nos. 17864/04 and 21396/04, Judgment of 19 July 2007, para. 60.

to stand as a candidate in the general elections to the lower chamber of the Russian Parliament. His application for registration was turned down on the ground that he had submitted untrue information about his employment.[406] However, the Court noted that, although it had never been disputed that the second applicant had been the head of the constitutional-law department at the Faculty of Law, the domestic authorities had given conflicting reasons as to why they believed that the information about his employment was untrue. The Court was concerned particularly with the fact that, not only had the findings of the domestic authorities been inconsistent *inter se*, but that they had also not been founded on any legal provision or case-law interpreting the requirements of the Election Act regarding the indication of the workplace. Specifically, "[T]he District Election Commission and the first-instance court did not cite any legal authority in support of their construction of that requirement, whereas the Supreme Court of the Russian Federation vaguely referred to the "spirit of the labour law"." In this connection, the Court observed that neither the obligation to list transfers and changes in employment, nor the duty to distinguish between permanent and temporary posts could be derived from a literal reading of the Election Act, which had only required an indication of "the principal place of work" if the candidate had had one. The lack of a clear legal basis for the domestic authorities' decisions called for the conclusion by the Court that they had not met the Convention standard of "lawfulness" and foreseeability of the impugned measure.[407]

For the Court's understanding of the standard of lawfulness of restrictions in the context of the right to free elections, see also the comments and case brief of *Paunović and Milivojević v. Serbia*, provided in this Study.

2. Legitimate Aims of the Restriction

Given that the right to free elections is not limited by a specific list of "legitimate aims", such as those enumerated in Articles 8 to 11 of the Convention, the Court has consistently held that Member States "are free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case."[408] Hence, the legitimate aims for the purposes of Article 1 of Protocol No. 1 to the Convention can only be exposed casuistically, by going through the Court's case-law. The ensuing text will thus outline the legitimate aims which concern the active and passive aspects of the right to free election.

406 *Ibid*., para. 43.
407 *Ibid*., para. 60.
408 *Ždanoka v. Latvia*, para. 115.

2.1 The Right to Vote

The Court has considered that the exclusion from the right to vote of persons under guardianship pursued a legitimate aim. These persons, although adults, lacked the capacity to manage their affairs, including exercise their right to vote, owing to their mental state, unsound mind or pathological addiction. The Court has accepted that the objective of such a measure had been to ensure that only citizens capable of assessing the consequences of their decisions, and capable of making conscious and judicious decisions participated in public affairs.[409]

The Court has also been satisfied that the disenfranchisement of citizens living abroad pursued the legitimate aim of confining the parliamentary franchise to those citizens with a close connection with their nation-state and who would therefore be most directly affected by its laws.[410] Although the question was put in different terms in *Sitaropoulos and Giakoumopoulos v. Greece*, the Court also found that Article 3 of Protocol No. 1 did not place States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad.[411]

The exclusion from voting imposed on convicted prisoners serving their prison sentences also pursued a legitimate aim for the purposes of Article 3 of Protocol No. 1, namely it was a measure intended to enhance civic responsibility and respect for the rule of law and ensure the proper functioning and preservation of the democratic regime.[412] Similarly, the Court had no doubt that temporary suspension of the voting rights of persons, against whom there had been evidence of Mafia membership, had pursued a legitimate aim.[413]

2.2 The Right to Stand for Election

The Court considered that the exclusive eligibility of the "constituent peoples" (the Bosniaks, Croats and Serbs) to stand for election to the House of Peoples of Bosnia and Herzegovina had pursued at least one aim which was "broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace." The Court

409 *Alajos Kiss v. Hungary*, paras. 25, 26, 28 and 38; *Gajcsi v. Hungary*, App. no. 62924/10, Judgment of 21 October 2014, paras. 10–11; *Harmati v. Hungary*, App. no. 63012/10, Judgment of 21 October 2014, paras. 7–8.

410 *Schindler v. the United Kingdom*, para. 107.

411 *Sitaropoulos and Giakoumopoulos v. Greece,* App. no. 42202/07, Judgment of 15 March 2012, paras. 70–81.

412 *Hirst v. the United Kingdom (No. 2)*, paras. 74–75; *Scoppola v. Italy*, App. no. 126/05, Judgment of 22 May 2012, paras. 74–75.

413 *Labita v. Italy*, App. no. 26772/95, Judgment of 6 April 2000, para. 202.

recalled that a very fragile ceasefire had been in effect on the ground when the impugned constitutional provisions were put in place. The nature of the brutal conflict had been such that the approval of the "constituent peoples" had been necessary to ensure peace. In the Court's view, this could explain, without necessarily justifying, the preoccupation of the participants at the peace negotiations with effective equality between the "constituent peoples" in the post-conflict society.[414]

In *Ždanoka v. Latvia,* the Court found that the impugned restriction pursued aims compatible with the principle of the rule of law and the general objectives of the Convention, namely the protection of the State's independence, democratic order and national security.[415] In this case, the applicant alleged a violation of Article 3 of Protocol No. 1 in view of her exclusion from standing as a candidate for election to the Latvian parliament.[416] The limitation was in accordance with the 1995 Parliamentary Elections Act, which excluded from participation in the work of a democratic legislature those individuals who had taken an active and leading role in the Communist Party of Latvia, which was directly linked to the attempted violent overthrow of the newly-established democratic regime in 1991.[417]

In *Krasnov and Skuratov v. Russia,* the registration of the candidatures was turned down on the ground that the applicants had submitted untrue information. The Court observed that the introduction of the requirement to submit information on the candidate's employment and party membership did not appear arbitrary or unreasonable. It served "to enable voters to make an informed choice with regard to the candidate's professional and political background" and was a legitimate aim for the purposes of Article 3 of Protocol No. 1.[418]

The requirement that a candidate for election to the national parliament have sufficient knowledge of the official language was also found to pursue a legitimate aim. In *Podkolzina v. Latvia*, the applicant was struck out of the list of candidates at the parliamentary elections because her command of Latvian was not at an advanced level. The Court considered that the interest of each State in ensuring that its own institutional system functioned normally was incontestably legitimate, and that the obligation for a candidate to understand and speak Latvian was warranted by the need to ensure the proper functioning of Parliament, in which Latvian was the sole working language.[419]

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414 *Sejdić and Finci v. Bosnia and Herzegovina*, para. 45.
415 *Ždanoka v. Latvia*, para. 118.
416 *Ibid.,* para. 116.
417 *Ibid.,* para. 122.
418 *Krasnov and Skuratov v. Russia*, para. 44.
419 *Podkolzina v. Latvia*, App. no. 46726/99, Judgment of 9 April 2002, para. 34.

The deposit requirement for electoral candidates pursued, in the Court's view, the legitimate aim of "guaranteeing the right to effective, streamlined representation by enhancing the responsibility of those standing for election and confining elections to serious candidates, whilst avoiding the unreasonable outlay of public funds." In other words, the discouragement of frivolous candidatures and the State's participation in the campaign costs of registered candidates, intended to ensure a level playing field for the candidates, were the relevant factors.[420]

3. Necessity of the Restriction

The "implied limitations" concept, adopted by the Court under Article 3 of Protocol No. 1, also means that the traditional tests of "necessity" or "pressing social need", used in the context of Articles 8 to 11 of the Convention, do not apply in the context of the right to free elections. In examining the necessity of a restriction for the purposes of Article 3 of Protocol No. 1, "the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people." In this connection, the Court has also recognised the wide margin of appreciation enjoyed by the Contracting States and stressed "the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another".[421]

The Court has also recognised that the need for individualisation of a legislative measure alleged to be in breach of the Convention, and the degree of that individualisation, depend on the circumstances of each particular case, namely "the nature, type, duration and consequences of the impugned statutory restriction." Nevertheless, the specificity of the right to free elections again comes into play here: "[F]or a restrictive measure to comply with Article 3 of Protocol No. 1, a lesser degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8 to 11 of the Convention."[422]

The necessity of the restriction standard differs in the Court's case-law depending on the aspect of the right to free election in issue. This is why the right to vote will be distinguished from the right to stand for election.

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420 *Soukhovetski v. Ukraine*, App. no. 13716/02, Judgment of 28 March 2006, paras. 61–62.
421 *Ždanoka v. Latvia*, para. 115.
422 *Ibid.*

3.1 The Right to Vote

The Court has held that the right to vote is not a privilege and that universal suffrage has become the basic principle. "In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power."[423]

For the Court's understanding of the standard of necessity of restriction in the context of the right to vote, see also the comments and case brief in *Alajos Kiss v. Hungary*, provided in this Study.

3.2 The Right to Stand for Election

As regards the passive aspect of the right to free election, the Court has been more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions of the active aspect of the right to free elections. Specifically, "while the test relating to the "active" aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the "passive" aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate".[424]

For the Court's understanding of the standard of necessity of restriction in the context of the right to stand for election, see also the comments and case brief in *Namat Aliyev v. Azerbaijan*, provided in this Study.

II SELECTED CASES: COMMENTS AND CASE BRIEFS

Cases selected in this Chapter exemplify different types of violations of Article 3 of Protocol No. 1 to the Convention and the Court's responses to them. They also reflect the challenges the Western Balkan countries are confronting in the administrative review of the acts infringing the right to free elections.

423 *Hirst v. the United Kingdom*, para. 59.

424 *Ždanoka v. Latvia*, para. 115.

Alajos Kiss v. Hungary was the first case in which the Court addressed the question of disenfranchisement of persons under partial guardianship due to their mental or intellectual state. After establishing that the disputed measure had pursued a legitimate aim, namely ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs, the Court applied the test of proportionality and found that an automatic, blanket removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, could not be considered proportionate. The Court also observed that there was no evidence that the Hungarian legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction as it stood. This could be compared with the approach of the British Parliament in the *Schindler* case, which had debated the issue of non-residents' voting rights on several occasions since 2000.[425] The seriousness of the issue raised in *Alajos Kiss* was further confirmed by the statistics which the Court took into consideration. According to it, not less than 0.75% of the Hungarian population of voting age was affected by disenfranchisement on account of being under guardianship in a manner which was indiscriminate. Confirming that the applicant's complaint in *Alajos Kiss v. Hungary* was not an isolated phenomenon, the Court found, pursuant to this judgment, the same type of violation in a number of other cases against Hungary.[426]

The lawfulness of the restriction has generally not been complained of in the Court's case-law under Article 3 of Protocol No. 1 to the Convention. However, in *Paunović and Milivojević v. Serbia*, which concerned the early termination of the applicant's parliamentary mandate, the requirement of lawfulness was not satisfied. In this type of cases, as it may be observed from the Convention case-law under Articles 8-11, the Court's establishment of infringement of a given right or freedom stops short of examining the "prescribed by law" requirement.[427] Hence, the Court does not examine whether the restriction in question pursued a legitimate aim and whether it was proportional. *Paunović and Milivojević v. Serbia* was not just one of those rare, but emblematic cases in which the Court found this type of violation with respect to the right to free elections. This case is also indicative of an important trend in comparative constitutional and administrative law. The rule of law requires that not only general (legislative) acts of parliament, but individual (administrative) acts as well, are subject to judicial review. And, the

425 *Schindler v. the United Kingdom*, para. 117.

426 *Gajcsi v. Hungary,* paras. 10–11; *Harmati v. Hungary,* paras. 7–8.

427 *Youth Initiative for Human Rights v. Serbia,* App. no. 48135/06, Judgment of 25 June 2013.

revocation of parliamentary mandates was a case of the latter. Traditionally, these acts were considered to be within the realm of the parliament's sovereignty and were therefore excluded from judicial review. Since there were no legal remedies against the administrative acts of the Parliament at the material time in Serbia, the Court found a violation of Article 13 of the Convention (right to an effective remedy) taken in conjunction with Article 3 of Protocol No. 1 to the Convention.

The Court's judgment in the case of *Namat Aliyev v. Azerbaijan* probably best illustrates the challenges present in the judicial reviews of administrative disputes in the Western Balkans. These challenges include: administrative inertia, excessive formalism and poorly reasoned judgments. In this kind of cases, the Court has pointed out that it is not only the alleged infringement of the applicant's individual rights which is at stake but also, on a more general level, the State's compliance with its positive duty to hold free and fair elections. Therefore, in order to ensure the State's compliance with its positive obligation under Article 3 of Protocol No. 1 to hold free elections, the Court has urged the domestic authorities, which are called upon to decide on an arguable claim concerning election irregularities, to react: by taking reasonable steps to investigate the alleged irregularities without imposing unreasonable and excessively strict procedural barriers on the individual complainant, as well as to ensure that a genuine effort was made to address the substance of arguable individual complaints concerning electoral irregularities and that the relevant decisions are sufficiently reasoned.

CASE OF ALAJOS KISS V. HUNGARY
(Final Judgment 20 May 2010)

CASE BRIEF

I FACTS

The applicant was born in 1954 and lives in Rózsaszentmárton, Hungary. In 1991, he was diagnosed with manic depression. On 27 May 2005, he was placed under partial guardianship. Although this measure was based on the Civil Code, it nevertheless also attracted the application of Article 70(5) of the Constitution to the applicant, excluding him from the right to vote.[428] The underlying court decision noted that he took care of himself adequately but sometimes wasted money in an irresponsible fashion and was occasionally aggressive. The applicant did not appeal against this decision.

428 Article 70(5) of the Hungarian Constitution provides *inter alia* that persons placed under total or partial guardianship do not have a right to vote.

On 13 February 2006, the applicant realised that he had been omitted from the electoral register drawn up in view of the upcoming legislative elections. His complaint to the Electoral Office was to no avail. The applicant further complained to the Pest Central District Court. On 9 March 2006, this court dismissed his case. It observed that, under Article 70(5) of the Constitution, those under guardianship could not participate in elections. This decision was served on the applicant's representative on 25 April 2006. In the meantime, legislative elections took place on 9 and 23 April 2006, in which the applicant could not participate.

II LEGAL ISSUES

Whether the applicant's exclusion – required by the Constitution itself – from the electoral register solely on the basis of his placement under partial guardianship amounted to a violation of Article 3 of Protocol No. 1.

III HOLDING (UNANIMOUSLY):

(1) The complaint under Article 3 of Protocol No. 1 of the Convention is admissible;

(2) There has been a violation of Article 3 of Protocol No. 1 of the Convention;

(3) The respondent State (Hungary) must ensure, within three months from the date on which the judgment becomes final, that the following amounts are paid to the applicant: EUR 3,000 plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 5,000 plus any tax that may be chargeable to the applicant, in respect of costs and expenses.

IV REASONING

(a) Reasons why the Court declared the application admissible

The Government submitted that the application should be rejected for non-exhaustion of domestic remedies, since the applicant had not appealed against his placement under guardianship.

The Court noted that the applicant had accepted the necessity of his placement under partial guardianship and that, therefore, he had not appealed against it. It observed that the subject matter of the application was not the guardianship measure, but its automatic consequence prescribed in

the Constitution, namely the applicant's disenfranchisement. It also took into account that the Government had not pointed to any remedy capable of redressing this latter issue. The Court concluded that the application could not be rejected for non-exhaustion of domestic remedies. The Court found that it was not manifestly ill-founded within the meaning of Article 35(3) of the Convention or inadmissible on any other grounds, and declared it admissible.

(b) Reasons why the Court found a violation of Article 3 of Protocol No. 1 of the Convention

After recalling the general principles of its case-law under Article 3 of Protocol No. 1 to the Convention, the Court focused on their application to the instant case. Since the rights bestowed by Article 3 of Protocol No. 1 were not absolute, there was room for implied limitations and Contracting States had to be allowed a margin of appreciation in this sphere, and the Court's task was to determine whether the measure in question had pursued a legitimate aim in a proportionate manner.

As to the legitimate aim, the Court pointed out that Article 3 of Protocol No. 1 did not, like other provisions of the Convention, specify or limit the aims which a restriction should pursue and that a wide range of purposes could therefore be compatible with Article 3. The Government had submitted that the measure complained of had pursued the legitimate aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. Since the applicant had accepted this view, the Court did not see any reason to hold otherwise. It was therefore satisfied that the measure had pursued a legitimate aim.

As to its proportionality, the Court noted that the restriction in question did not distinguish between those under total and those under partial guardianship, and was removed once guardianship was terminated. However, it took note of the applicant's assertion, not refuted by the Government, that 0.75% of the Hungarian population of voting age was affected by disenfranchisement on account of being under guardianship in a manner which was indiscriminate. It found this to be a significant figure, and that it could not be claimed that the bar was negligible in its effects.

Relying on the margin of appreciation, the Government argued that the legislature had to be allowed to establish rules ensuring that only those capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.

The Court accepted that this was an area in which, generally, a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote could be justified in modern times and, if so, how a fair balance was to be struck. In particular, it should have been for the legislature to decide as to what procedure should have been tailored to assessing the fitness to vote of mentally disabled persons. However, the Court observed that there was no evidence that the Hungarian legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction as it stood.

The Court could not accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, fell within an acceptable margin of appreciation. Indeed, the Court reiterated that although this margin of appreciation was wide, it was not all-embracing. In addition, if a restriction on fundamental rights applied to a particularly vulnerable group in society, who had suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation was substantially narrower and it had to have very weighty reasons for the restrictions in question. The reason for this approach, which questioned certain classifications *per se*, was that such groups had been historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail, as advanced by the Court, legislative stereotyping which prohibited the individualised evaluation of their capacities and needs.

Returning to the facts of the case, the Court noted that applicant in the present case had lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship. He could therefore claim to be a victim of the measure. The Court could not speculate as to whether the applicant would still have been deprived of the right to vote even if a more limited restriction on the rights of the mentally disabled had been imposed in compliance with the requirements of Article 3 of Protocol No. 1.

The Court further considered that the treatment as a single class of those with intellectual or mental disabilities was a questionable classification, and that the curtailment of their rights had to be subject to strict scrutiny, which was the approach reflected in other instruments of international law. The Court therefore concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, could not be considered compatible with the legitimate grounds for restricting the right to vote, and found that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

(c) Decision on just satisfaction

The applicant claimed EUR 10,000 in respect of non-pecuniary damage. The Court considered that the applicant had suffered some non-pecuniary damage and awarded him, on an equitable basis, EUR 3,000 under this head. The applicant also claimed EUR 7,500 for the costs and expenses incurred before the domestic authorities and the Court. According to the Court's case-law, an applicant was entitled to the reimbursement of costs and expenses only in so far as it had been shown that these had been actually and necessarily incurred and had been reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considered it reasonable to award the sum of EUR 5,000 covering costs under all heads.

CASE OF PAUNOVIĆ AND MILIVOJEVIĆ V. SERBIA
(Final Judgment 24 May 2016)

CASE BRIEF

I FACTS

The applicants, Mr Goran Paunović ("the first applicant") and Ms Ksenija Milivojević ("the second applicant"), Serbian nationals who were born in 1965 and 1975 respectively, filed a case before the Court alleging that they had been deprived of their right to sit as members of the National Parliament of the Republic of Serbia ("the Parliament").

Parliamentary elections in Serbia are held on the basis of a proportional representation system in which candidates for Parliament are included on lists put forward by political parties or coalitions. Voters choose between these lists, without voting directly for individual candidates.

In 2003, the applicants were elected as members of parliament (MPs) for a political party called G17 PLUS. Before the elections, however, all candidates, including the applicants, had been required by their party to sign undated letters of resignation and hand them in to the party. The documents also authorised the party to appoint other candidates in their place if necessary.

Following political differences between the applicants and their party, on 5 May 2006, the first applicant signed a separate, officially certified statement, in which he declared his prior resignation letter to be null and void. The first applicant informed G17PLUS and the President of Parliament of this

statement and made it public. The second applicant also subsequently told Parliament, the party and the public that she considered her earlier resignation letter to be null and void.

On 15 May 2006, the head of the G17 PLUS party group in Parliament dated the applicants' resignation letters and submitted them to the President of the Parliament. On the same day, the first applicant addressed the Parliamentary Committee on Administrative Affairs, explaining that he did not intend to resign and that he wished to keep his seat as an independent MP. He provided the Committee with his certified statement of 5 May 2006. However, the Committee concluded that both applicants had resigned and held that their parliamentary mandates were deemed to be terminated. On 16 May 2006, a plenary session of Parliament confirmed that decision and accepted two other candidates proposed by G17PLUS as MPs in place of the applicants.

On 25 May 2006, the applicants filed two separate complaints with the Supreme Court and the Constitutional Court, seeking the annulment of the Parliament's decisions to terminate their mandates and replace them with other candidates. On 29 May 2006, the complaint made to the Supreme Court was dismissed on procedural grounds. That court stated that the impugned parliamentary decisions had not been "administrative acts" and could not, as such, be subject to judicial review. On 29 May 2008, the Constitutional Court also ruled against the applicants, without considering the merits of their case. It stated that new parliamentary elections had been held in January 2007, which was why the applicants' complaint had effectively become moot. It noted that their complaint could not have been treated as a constitutional appeal, as envisaged under the Constitution adopted in November 2006, since the parliamentary decisions at issue had been made several months before the new Constitution had been adopted.

II LEGAL ISSUES

(1) Whether the deprivation of the applicants of their right to sit as members of the National Parliament of the Republic of Serbia violated their right to free elections under Article 3 of Protocol No. 1 to the Convention.

(2) Whether the dismissal of the applicants' complaints regarding the alleged violation of their right to sit as members of the National Parliament of the Republic of Serbia by the domestic authorities, without examining them on their merits, amounted to a violation of Article 13 of the Convention, taken in conjunction with Article 3 of Protocol No. 1.

(3) Whether Article 6 of the Convention applies to judicial proceedings involving the determination of the applicant's right to stand as a candidate in the parliamentary elections.

(4) Whether Article 14 of the Convention was violated as a result of the applicants' discrimination on the basis of their political opinion.

III HOLDING

(1) The application in so far as it concerns the complaints of the second applicant (Ms Milivojević) is struck out (unanimously);

(2) The complaints of the first applicant (Mr Paunović) under Articles 13 and 14 of the Convention and Article 3 of Protocol No. 1 to the Convention are admissible and the remainder of the application is inadmissible (unanimously);

(3) There has been a violation of Article 3 of Protocol No. 1 to the Convention regarding the first applicant (unanimously);

(4) There has been a violation of Article 13 of the Convention regarding the first applicant (unanimously);

(5) There is no need to examine the first applicant's complaint under Article 14 of the Convention (unanimously);

(6) The finding of the violation of Article 3 of Protocol No. 1 to the Convention constitutes in itself sufficient just satisfaction in respect of non-pecuniary damage sustained by the applicant (by six votes to one);

(7) The respondent State is to pay the first applicant EUR 4,600 in respect of pecuniary damage and EUR 5,400, plus any tax that may be chargeable to the applicant, in respect of costs and expenses (unanimously);

(8) The remainder of the first applicant's claim for just satisfaction is dismissed (unanimously).

IV REASONING

1. Decision Regarding the Second Applicant (Ms Milivojević)

The Court noted that, in her letter dated 12 February 2015 the second applicant informed the Court that she would like to withdraw her application, in line with Article 37(1) of the Convention. Since the Court did not find any special circumstances relating to respect for human rights as defined in the Convention and its Protocols, which required it to continue the examination of the application in respect of the second applicant, it decided to strike it out of the Court's list of cases in so far as it related to this applicant.

2. Decision Regarding the First Applicant (Mr Paunović)

(a) Reasons why the Court declared the application admissible

Challenging the compatibility of the application with the Convention on the *ratione personae* ground, the Government argued that the State could not be held responsible for the termination of the applicant's parliamentary mandate as it had been the result of a private-law contract between the applicant and his political party. In the Government's view, Parliament's decision to terminate the mandate had been purely declaratory in nature and had merely established the facts that had resulted from the contract.

The Court dismissed this objection noting that the applicant's parliamentary mandate had been terminated by Parliament on the basis of a pre-prepared letter of resignation. According to the Court, it was evident that the State had deprived the applicant of his parliamentary mandate by accepting his letter of resignation.

The Government also argued that the applicant had not exhausted all the available effective domestic remedies. It reiterated that the termination of the applicant's mandate had been the result of a private-law contract and submitted that, in view of that fact, the applicant had not brought a separate civil suit for annulment of the contract, under the Obligations Act.

The Court dismissed this objection as well. It noted that the applicant had complained about the termination of his mandate by the Parliament and had brought two separate actions in that connection, one with the Supreme Court and one with the Constitutional Court, seeking the annulment of the Parliament's decision. These courts had ruled against the applicant, without considering the merits of his case. Furthermore, the Court advanced that, even assuming that the applicant had successfully had his "blank resignation" set aside in civil proceedings, this would not have been an effective remedy in the particular circumstances of the case, because there had been no suggestion by the Government that the annulment would have resulted in the applicant's parliamentary mandate being restored. Concretely, the Court observed that the Government had not been able to cite any domestic case-law in which a claim based on Articles 111 and 112 of the Obligations Act had been brought successfully in a case such as the applicant's.[429]

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429 Articles 111 and 112 provide that a contract can be declared null and void if it was concluded by a party acting with limited legal capacity or if it was concluded as a result of shortcomings in the intentions of the parties (*mane volje*).

Consequently, the Court noted that the complaint was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention and declared it admissible.

(b) Reasons why the Court found a violation of Article 3 of Protocol No. 1 to the Convention

After presenting the general principles of its case-law under Article 3 of Protocol No. 1 to the Convention, the Court focused on their application to the instant case. It reiterated that Article 3 of Protocol No. 1 was phrased differently from the other provisions of the Convention and its Protocols. The Convention established an obligation on the High Contracting Parties, rather than a guarantee of a specific right or freedom. This obligation implied, according to the Court, the "lawfulness" of any measures taken by the State, the rule of law being one of the fundamental principles of a democratic society, and, accordingly, inherent in all the Articles of the Convention and its Protocols. This principle, the Court advanced, entailed a duty on the part of the State to put in place a framework of legislation and, as appropriate, subordinate legislation, for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular. And, the issue arising in the present case was, indeed, as interpreted by the Court, whether the termination of the applicant's parliamentary mandate had been in accordance with the applicable legal rules.

The Court considered that it was clear that, at the time the applicant had been deprived of his parliamentary mandate, the domestic legislation specified that a parliamentary mandate belonged to an MP personally, not to the political party on whose list he or she had been elected. The Court further observed that; in accordance with the rule established by Article 230 of the Parliamentary Rules of Procedure, an MP, when tendering his or her resignation, had to do so in writing and to hand it personally to the President of Parliament.

In the present case, as the Court noted, the resignation had not been delivered to Parliament by the applicant in person, but by a representative of his political party, in defiance of the applicant's express wishes to the contrary. The Court was unable to accept the Government's assertion that Parliament had been unaware of the applicant's intention not to resign at the time the decision to deprive him of his parliamentary mandate was made. Indeed, it was not disputed between the parties that the applicant had been present at the session of the Parliamentary Committee on Administrative Affairs, at which he personally submitted a copy of the statement in which he had declared his prior resignation to be null and void. Moreover, it transpired

from the minutes of the session of that Committee, submitted to the Court by the Government, that the applicant had personally informed the Committee members of his intention not to resign and that he had considered his prior resignation null and void.

Having regard to the above, the Court concluded that the termination of the applicant's mandate had been in breach of the Election of Members of Parliament Act and the Parliamentary Rules of Procedure. Accordingly, the entire process of revoking the applicant's mandate had been conducted outside the applicable legal framework and had therefore amounted to a violation of Article 3 of Protocol No. 1 to the Convention.

(c) Reasons why the Court found a violation of Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1

The Court noted at the outset that, in cases where a post-election dispute concerning electoral rights had been subject to review by a domestic court, it chose to examine the complaints solely under Article 3 of Protocol No. 1 to the Convention. However, in cases where post-election disputes had not been subject to review by domestic courts, the Court delivered a separate examination of the complaint under Article 13.

The applicant submitted that he had challenged the termination of his mandate before the Supreme Court and the Constitutional Court. Those courts had dismissed the applicant's complaints without examining them on their merits and the applicant claimed that he had had no other effective domestic remedies at his disposal. Replying to these submissions, the Government argued that an effective domestic remedy within the meaning of Article 13 of the Convention had been available to the applicant, namely, that he could have challenged the termination of his mandate in civil proceedings under the Obligations Act.

The Court noted that this complaint was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention and declared it admissible. The Court further observed that the Government had already raised the argument regarding the effectiveness of the civil proceedings in its objections to the admissibility of the complaint in respect of Article 3 of Protocol No. 1, and it advanced that this argument should be rejected for the reasons set out above. Accordingly, the Court considered that there had also been a violation of Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

(d) Reasons why the Court did not consider the complaint under Article 6(1) of the Convention

The applicant complained that he had not had a fair trial before the Supreme Court and the Constitutional Court in so far as both courts had refused to examine his complaints on their merits, which amounted to a violation of Article 6(1) of the Convention.

The Court noted that proceedings involving electoral disputes, including those resulting in the removal of elected candidates, fell outside the scope of Article 6 of the Convention, in so far as they concerned the exercise of political rights and did not, therefore, have any bearing on "civil rights and obligations" within the meaning of Article 6(1) of the Convention. Accordingly, it declared the complaint incompatible *ratione materiae* with the provisions of the Convention and rejected it pursuant to paragraphs 3(a) and 4 of Article 35.

(e) Reasons why the Court did not consider the complaint under Article 14 of the Convention

Lastly, the applicant complained that he had been discriminated against on the basis of his political opinion, which had resulted in the termination of his parliamentary mandate.

The Court noted that this complaint was linked to the one examined in relation to Article 3 of Protocol No. 1, and that, likewise, it had to be declared admissible. However, having regard to its finding in relation to Article 3 of Protocol No. 1, the Court considered that it was not necessary to examine whether there had been a violation of Article 14.

(f) Decision on just satisfaction

The first applicant claimed EUR 4,600 in respect of pecuniary damage, corresponding to the net salary and allowances to which he would have been entitled as an MP for the period between 16 May 2006 and 14 February 2007, when the mandates of all deputies in the Parliament had ended because of new elections. He also sought EUR 100,000 in respect of non-pecuniary damage, for the injury he claimed to have suffered as a result of being prevented from carrying out his duties as an MP and for the attacks and injustice to which he claimed he and his family had been exposed.

The Court decided that the Government should pay the first applicant the entire sum claimed in respect of pecuniary damage. At the same time, the Court considered that the finding of a violation of Article 3 of Protocol No. 1 constituted sufficient just satisfaction in respect of non-pecuniary damage and accordingly made no award under this head.

The first applicant also claimed EUR 1,440 for the costs and expenses incurred before the domestic courts and EUR 4,800 for those incurred before the Court.

According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considered it reasonable to award the sum of EUR 5,400 covering costs under all heads.

CASE OF CASE OF NAMAT ALIYEV V. AZERBAIJAN
(Final Judgment 8 April 2010)

CASE BRIEF

I FACTS

The applicant stood for elections to the Azerbaijani Parliament (*Milli Majlis*) of 6 November 2005 as a candidate of the opposition bloc Azadliq. He was registered as a candidate by the Constituency Electoral Commission ("the ConEC") for the single-mandate electoral constituency. The constituency was divided into forty-two electoral precincts, with one polling station in each precinct. According to the ConEC protocol drawn up after election day, one of the applicant's opponents, Z. O., won the highest number of votes cast in the constituency. Specifically, according to the ConEC protocol, Z. O. received 5,816 votes (41.25%), the applicant received 2,001 votes (14.19%), and a third candidate received 1,821 votes (12.92%). The total number of votes cast for each of the remaining fifteen candidates was substantially lower.

On 7 and 8 November 2005, the applicant submitted identical complaints to the ConEC and the Central Electoral Commission ("the CEC"), in which he claimed, *inter alia*, that: (i) the local executive and municipal authorities, as well as heads of state-funded institutions and organisations, interfered in the election process in favour of Z. O. prior to and during election day, openly campaigning in his favour and coercing voters to vote for him; (ii) Z. O.'s supporters (mostly State officials of various sorts) intimidated voters and otherwise attempted to influence voter choice in polling stations; (iii) in several polling stations, observers were harassed or excluded from the voting area by the police; (iv) some citizens residing in relevant election precincts were unable to exercise their right to vote due to the authorities' failure to include them in relevant voters lists; and (v) there were instances of

multiple voting and ballot-box stuffing in different polling stations. In support of his claims, the applicant submitted to the CEC originals of more than 30 affidavits of election observers, audio tapes and other evidence documenting specific instances of irregularities complained of.

According to the applicant, neither the ConEC nor the CEC replied to his complaints. According to the Government, the applicant's complaint had been examined by the ConEC. As it appeared from the documents submitted by the Government, the ConEC had demanded explanations from the chairmen and members of the relevant Precinct Electoral Commissions ("the PEC") for the polling stations in connection with the applicant's allegations. In reply, about twenty PEC chairmen and members submitted brief handwritten statements (some of them as short as one or two sentences), or "explanatory notes", all signed on 21 November 2005. All these notes stated in general terms that the election process in their respective polling stations had gone smoothly and without any irregularities, and that any allegations by the applicant to the contrary were false. On 23 November 2005, the ConEC rejected the applicant's complaint. Without any elaboration on details of the applicant's specific allegations, it decided that they had been unsubstantiated.

On 25 November 2005, the applicant lodged an action with the Court of Appeal, asking it to invalidate the CEC's final protocol in the part relating to the election results in his electoral constituency. In addition to restating all of his complaints made previously to the electoral commissions, he also complained of specific instances of discrepancies and inconsistencies in the PEC protocols, which had served as a basis for compiling the election results in the constituency as a whole. In particular, more than 700 blank ballots out of more than 1,000 blank ballots originally issued to the PEC appeared to be "missing". In another polling station, it appeared that more than 600 blank ballots were unaccounted for. Similar discrepancies were also allegedly found in PEC protocols for five other polling stations. The applicant claimed that these "missing" blank ballots had been sneaked out and illegally used for ballot-box stuffing in favour of Z. O. in various other polling stations.

The applicant argued that, due to all these irregularities, it was not possible to determine the true opinion of the voters in his constituency. He also complained that the CEC had failed to examine his complaint of 7 November 2005. In support of his claims, the applicant submitted copies of the same evidence previously submitted to the CEC, including photocopies of the observers' affidavits and copies of audio material.

On 28 November 2005, the Court of Appeal dismissed the applicant's claims as unsubstantiated. That court did not consider the photocopies of the affidavits as admissible evidence, noting that, under the Code of Civil

Procedure, either the originals or notarised copies of those affidavits should have been submitted.

On 30 November 2005, the applicant lodged a further appeal with the Supreme Court, reiterating his claims. He also noted that he had submitted the originals of the documentary evidence to the CEC on 7 November 2005 and argued that the Court of Appeal had failed to take this fact into account.

On 1 December 2005, the Supreme Court dismissed the applicant's appeal on the same grounds as the Court of Appeal's judgment of 28 November 2005. As to the originals of the documentary evidence allegedly submitted to the CEC, the Supreme Court noted that the applicant had failed to submit any evidence proving that he had ever applied to the CEC with a complaint.

II LEGAL ISSUES

(1) Whether an issue is raised under Article 3 of Protocol No. 1 to the Convention when the difference in the official vote totals received by the winning candidate at the disputed elections and the applicant is so significant that, even if the applicant's allegations concerning some election irregularities in various polling stations were true, it would not affect the ultimate result of the election.

(2) Whether the essence of the applicant's individual right to stand for election had been impaired by the ineffective and arbitrary manner in which the election irregularities he had complained of had been addressed at the domestic level.

(3) Whether the applicant, as an opposition candidate, had been discriminated against, contrary to Article 14 of the Convention, during the entire election process, due to his political affiliation and, more concretely, whether he had not been allowed to run for election under equal conditions with the candidates affiliated with the incumbent party.

(4) Whether Article 6 of the Convention applies to judicial proceedings involving the determination of the applicant's right to stand as a candidate in parliamentary elections.

III HOLDING (UNANIMOUSLY)

(1) The complaints under Article 3 of Protocol No. 1 to the Convention and Article 14 of the Convention are admissible and the remainder of the application inadmissible;

(2) As to the first legal issue, there has been a violation of Article 3 of Protocol No. 1 to the Convention;

(3) As to the second legal issue, there is no need to examine separately the complaint under Article 14 of the Convention;

(4) As to the third legal issue, Article 6 of the Convention does not apply to the proceedings complained of;

(5) The respondent State (Azerbaijan) must pay the applicant, within three months of the date on which the judgment becomes final, EUR 7,500, plus any tax that may be chargeable, in respect of non-pecuniary damage; and EUR 1,600 plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(6) The remainder of the applicant's claim for just satisfaction is dismissed.

IV REASONING

(a) Reasons why the Court declared the application admissible

The Court considered that the complaint, as a whole, was not manifestly ill-founded within the meaning of Article 35(3) of the Convention or inadmissible on any other grounds, and declared it admissible.

(b) Reasons why the Court found a violation of Article 3 of Protocol No. 1 to the Convention

After recalling the principles of its case-law under Article 3 Protocol 1 to the Convention, the Court addressed the Government's argument that the difference in the official vote totals received by Z. O. and the applicant had been so significant that, even if the applicant's allegations concerning some election irregularities in various polling stations had been true, it would not have affected the ultimate result of the election. The Court could not accept this argument. The Court observed that, in order to arrive at the conclusion which had been proposed by the Government, it was first necessary to separately assess the seriousness and magnitude of the alleged election irregularity prior to determining its effect on the overall outcome of the election. However, in the present case, the question whether this had been done in a diligent manner was a major point of contention between the parties in the context of the present complaint and, therefore, could not escape the Court's review.

Relying on its conclusions in *The Georgian Labour Party v. Georgia*,[430] the Court affirmed that what was at stake in the present case was not the

430 *The Georgian Labour Party v. Georgia*, App. no. 9103/04, Judgment of 8 July 2008, para. 121.

applicant's right to win the election in his constituency, but his right to stand freely and effectively for it. The Court further noted that "[T]he applicant was entitled under Article 3 of Protocol No. 1 to stand for election in fair and democratic conditions, regardless of whether ultimately he won or lost. In the present case, Article 3 of Protocol No. 1 requires the Court not to ascertain merely that the election outcome as such was not prejudiced, but to verify that the applicant's individual right to stand for election was not deprived of its effectiveness and that its essence had not been impaired."

As for the applicant's claims concerning the specific instances of alleged irregularities, the Court noted that it was not in a position to assume a fact-finding role in the circumstances of the present case. Owing to the subsidiary nature of its role, the Court could not attempt to determine whether all or part of these alleged facts had taken place and, if so, whether they had amounted to irregularities capable of thwarting the free expression of the opinion of the people. The Court affirmed that its task was rather to satisfy itself, from a more general standpoint, that the respondent State had complied with its obligation to hold elections under free and fair conditions and had ensured that individual electoral rights were exercised effectively.

In that respect, the Court acknowledged the seriousness of the claims which the applicant had made before the domestic authorities, in particular: the unlawful interference in the election process by local executive authorities, undue influence on voter choice, several instances of ballot-box stuffing, harassment of observers, irregularities in electoral rolls and obvious discrepancies in PEC protocols showing a possible failure to account for as many as thousands of "unused" blank ballots. The Court considered that these types of irregularities, if duly confirmed to have taken place, had been indeed potentially capable of thwarting the democratic nature of the elections. The Court further noted that the applicant's allegations had been based on the relevant evidence, which had consisted mainly of affidavits signed by official observers, who gave fact-specific accounts of the alleged irregularities witnessed by them. The Court also had regard to the Final Report of the OSCE/ODIHR Election Observation Mission concerning the elections of 6 November 2005. While this report did not contain any information relating exclusively to the applicant's constituency, it gave a general account of the most frequent problems identified during the election process, corroborating indirectly the applicant's claims.

Referring to the approach it had taken in the *Babenko v. Ukraine,*[431] the Court emphasised that where complaints of election irregularities had been addressed at the domestic level, its examination should be limited to verifying

431 *Babenko v. Ukraine* (dec.), App. no. 43476/98, Decision of 4 May 1999.

whether any arbitrariness could be detected in the domestic court procedure and decisions. In this context, the Court reiterated that the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights was one of the essential guarantees of free and fair elections: "Indeed, the State's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter."

In the present case, the applicant made use of the system of examination of individual election-related complaints and appeals provided by the Azerbaijani law. He claimed that the electoral commissions had not even replied to his complaints. The Government, however, presented proof that his complaint had been examined by the ConEC. Nevertheless, having regard to the documents submitted by the Government, the Court noted that, while the ConEC had taken as long as sixteen days to deliver its decision (compared to the three-day time-limit provided by the Electoral Code), it had done nothing more than request written explanations from the relevant PEC chairmen and members. Given that the confirmation of these allegations could have potentially entailed the responsibility on the part of these PEC officials for the election irregularities, it was not surprising, according to the Court, that all of them had simply denied any wrongdoing using the most general wording. For this reason, and having regard to their content, the Court was not convinced that these statements had been particularly helpful in determining the factual accuracy of the applicant's claims.

The Court also had reservations with regards to the ConEC's apparently exclusive reliance on the statements of PEC officials in deciding to dismiss the applicant's complaint, without explaining why these statements had been considered to be more reliable than the much more detailed and fact-specific evidence presented by the applicant. In fact, no reason had been offered by the ConEC in support of its finding that the applicant's claims had been "unsubstantiated". The Court contrasted these facts with those of the *Babenko* case where a domestic court had examined each specific allegation of election irregularity in detail and assessed its effect on the election.

As for the complaint lodged directly with the CEC, the Court noted that the applicant had submitted documentary evidence proving that his complaint had been received by the CEC on 8 November 2005. However, it appeared that the CEC had, indeed, ignored the applicant's complaint and left it unexamined. The Court referred to the OSCE/ODIHR Report, which had noted that "in the vast majority of cases" the CEC merely transmitted individual complaints to the

relevant ConECs without examining them, and that it "did not address most of [the] complaints" it received on and after election day.

The Court found that the applicant's subsequent appeals lodged with the Court of Appeal and the Supreme Court had not been addressed adequately either. It considered that both courts had relied on extremely formalistic reasons to avoid examining the substance of the applicant's complaints, finding that he had not submitted duly certified copies of the relevant observers' affidavits and that he had not attached to his cassation appeal documentary proof that he had indeed applied to the CEC. Judging such a rigid and overly formalistic approach as not justified under the Convention, the Court recalled the Venice Commission's Code of Good Practices in Electoral Matters, which cautioned against excessive formalism in examination of election-related appeals, in particular where the admissibility of appeals was concerned. In such circumstances, the Court was particularly struck by the fact that the domestic courts had not attempted to request the CEC to confirm whether it had been in possession of those originals or to otherwise establish the authenticity of those affidavits. At the very least, the national courts should have allowed the applicant an opportunity to supplement his written submissions with any additional evidence deemed necessary, such as documentary proof that he had indeed applied to the CEC.

Moreover, the Court noted that in any event, not all of the applicant's allegations had been based on those observers' affidavits. His complaint had also mentioned other alleged serious irregularities, including apparent inconsistencies in several PEC protocols disclosing potential large-scale tampering with ballots on the PEC level. In terms of initial evidence necessary for examining this specific issue, the Court observed that the national courts had to do nothing more than request the electoral commissions to submit those protocols to them for an independent examination. If such examination had indeed revealed inconsistencies, a more thorough assessment of their impact on the election results would have been necessary. However, the relevant court decisions had been silent in respect of this part of the applicant's complaint.

The foregoing considerations were sufficient to enable the Court to conclude that the applicant's complaints concerning election irregularities had not been effectively addressed at the domestic level and had been dismissed in an arbitrary manner. Accordingly, the Court found a violation of Article 3 of Protocol No. 1 to the Convention.

In reaching this conclusion, the Court made two principled remarks. Firstly, in its view, not only the alleged infringement of the applicant's individual rights but also, on a more general level, the State's compliance with its positive duty to hold free and fair elections, were at stake in the given proceedings.

And, in order to ensure the State's compliance with its positive obligation under Article 3 of Protocol No. 1 to hold free elections, the domestic courts dealing with the present case, which had been called upon to decide on an arguable claim concerning election irregularities, should have reacted by taking reasonable steps to investigate the alleged irregularities without imposing unreasonable and excessively strict procedural barriers on the individual complainant.

Secondly, the Court acknowledged that, owing to the complexity of the electoral process and associated time-restraints necessitating streamlining of various election-related procedures, the relevant domestic authorities could be required to examine election-related appeals within comparatively short time-limits in order to avoid retarding the electoral process. For the same practical reasons, the States could find it inexpedient to require of these authorities to abide by a set of very strict procedural safeguards or to deliver very detailed decisions. Nevertheless, these considerations could not serve to undermine the effectiveness of the appeal procedure, and it had to be ensured that a genuine effort was made to address the substance of arguable individual complaints concerning electoral irregularities, and that the relevant decisions were sufficiently reasoned.

(c) Reasons why the Court did not consider the complaint under Article 14 of the Convention

The applicant complained that, during the entire election process he, as an opposition candidate, had been discriminated against due to his political affiliation and had not been allowed to run for election under equal conditions with the candidates affiliated with the incumbent party. The Court considered that it was not necessary to examine whether in this case there had been a violation of Article 14, having regard to its above finding of a breach of Article 3 of Protocol No. 1.

(d) Reasons why the Court did not consider the complaint under Article 6 of the Convention

The applicant complained under Article 6 of the Convention that the domestic judicial proceedings had been unfair and arbitrary. The Court noted that the proceedings in question involved the determination of the applicant's right to stand as a candidate in the parliamentary elections. The dispute in issue therefore concerned the applicant's political rights and did not have any bearing on his "civil rights and obligations" within the meaning of Article 6(1) of the Convention. Recalling its well-established case-law in this respect, the Court concluded that this Convention provision did not apply to the

proceedings complained of. It followed that the complaint was incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) and the Court rejected it in accordance with Article 35(4).

(e) Decision on just satisfaction

The applicant claimed pecuniary damages in respect of various expenses related to his electoral campaign, such as expenses for the publication of his campaign advertisement, salaries paid to his campaign staff, renting office space for his election headquarters, etc. The Court noted that the application had been about the applicant's right to stand for election. It could not be assumed that, had the applicant's right not been infringed, he would have necessarily won the election in his constituency and become a member of parliament. Therefore, the Court considered that it could not be speculated that the expenditure on his electoral campaign was a pecuniary loss. As no causal link has been established between the alleged pecuniary loss and the violation found, the Court dismissed the applicant's claim under this head.

The applicant also claimed non-pecuniary damage caused by the infringement of his electoral right. The Government argued that the amount claimed was excessive and considered that the finding of a violation of the Convention would constitute sufficient just satisfaction in itself. The Court considered that the applicant had suffered non-pecuniary damage, which could not be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awarded him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

Finally, the applicant claimed reimbursement of legal fees incurred in the proceedings before the Court, for translation expenses and for postal expenses. In support of his claims, he submitted a contract for legal services rendered in the proceedings before the Court and a contract for translation services. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Taking into account the amount of legal work done in the present case and the total amount of material actually translated, the Court considered that the claims in respect of both the legal fees and translation expenses were excessive and could therefore be satisfied only partially. Furthermore, the Court observed that the applicant had failed to support his claim for postal expenses with any documentary evidence and that no sum could therefore be awarded in respect of those expenses. Regard being had to the above, the Court considered it reasonable to award the sum of EUR 1,600 covering costs under all heads, plus any tax that may be chargeable to the applicant on that sum.

III LIST OF ECTHR CASES CITED IN THE CHAPTER

Alajos Kiss v. Hungary, 38832/06 (2010)

Aziz v. Cyprus, 69949/01 (2004)

Bowman v. the United Kingdom, 141/1996/760/961 (1998)

Gajcsi v. Hungary, 62924/10 (2014)

Golder v. the United Kingdom, 4451/70 (1975)

Grosaru v. Romania, 78039/01 (2010)

Harmati v. Hungary, 63012/10 (2014)

Hirst v. the United Kingdom (No. 2) [GC], 74025/01 (2005)

Krasnov and Skuratov v. Russia, 17864/04 and 21396/04 (2007)

Labita v. Italy, 26772/95 (2000)

Ljube Boškoski v. the former Yugoslav Republic of Macedonia, 11676/04 (2004)

Mathieu-Mohin and Clerfayt v. Belgium, 9267/81 (1987)

Molka v. Poland, 56550/00 (2006)

Namat Aliyev v. Azerbaijan, 18705/06 (2010)

Paskas v. Lithuania, 34932/04 (2011)

Paunović and Milivojević v. Serbia, 41683/06 (2016)

Podkolzina v. Latvia, 46726/99 (2002)

Riza and Others v. Bulgaria, 48555/10 and 48377/10 (2015)

Schindler v. the United Kingdom, 19840/09 (2013)

Scoppola v. Italy, 126/05 (2012)

Sejdić and Finci v. Bosnia and Herzegovina, 27996/06 and 34836/06 (2009)

Sitaropoulos and Giakoumopoulos v. Greece, 42202/07 (2012)

Soukhovetski v. Ukraine, 13716/02 (2006)

Youth Initiative for Human Rights v. Serbia, 48135/06 (2013)

Yumak and Sadak v. Turkey, 10226/03 (2008)

Ždanoka v. Latvia, 58278/00 (2006)

Chapter 7: EXPULSION OF ALIENS: APPLICABLE STANDARDS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

I INTRODUCTION

The ongoing migration "crisis" indicates that standards of protection afforded to aliens by the European Convention on Human Rights are needed more than ever. The mass movement of more than one million people, fleeing from to Europe wars and poverty, has been used by some European states to assert that states have the sovereign power to decide who can or cannot enter their territory, even at the expense of the migrants' human rights and freedoms.[432] In some cases, refugees and migrants turned to the ECtHR, seeking the protection of their dignity. Without calling into question the States' right to establish their own immigration policies, the Court reacted promptly and, in a short time, built significant case-law in which, by taking a dynamic and effective approach in interpretation, proved to be the "conscience of Europe".[433]

It is interesting to observe that, despite the fact that Protocol No. 4 to the Convention was adopted in 1963 and entered into force in 1968, the Court found the first breach of Article 4 embodied in Protocol No. 4 only in 2002.[434] The Court has recently reviewed several cases in which the applicants claimed to be the victims of "collective expulsion". It started to develop its jurisprudence in 2012, when, in *Hirsi Jamaa and Others v. Italy*,[435] it found that Article 4 of the Protocol No. 4 was applicable extraterritorially, particularly

432 For more see Violeta Beširević and Tatjana Papić, "From Sovereignty to Post-Sovereignty and Back: Some Reflections on Immigration and Citizenship Issues in the Perspective of Refugee 'Crisis'", 29 *European Review of Public Law* 1, (2017), pp. 125–156.

433 For more see Daniel Rietiker, "Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times", 39 *Suffolk Transnational Law Review* 651, (2016).

434 *Ibid*, *op. cit.*, p. 653.

435 *Hirsi Jamaa and Others v. Italy,* App. No. 27765/09, Judgment of 23 February 2012.

to migrants captured at sea.[436] It should be added that one of the cases, relevant for the targeted countries in this Study, *A. A. and Others v. the former Yugoslav Republic of Macedonia*, is still pending before the Court.[437]

Generally, the key provisions of the Convention prohibiting arbitrary expulsion of aliens are the ones contained in Article 4 of Protocol No. 4, protecting aliens against collective expulsion, Article 3 of the Convention, prohibiting inhuman and degrading treatment, Article 5(1)(f), protecting aliens from arbitrary detention, Article 8, protecting applicants against removal to safeguard their family life, and Article 13 of the Convention, concerning the availability of effective remedies that may prevent expulsion decisions that are contrary to the Convention.

This Chapter sheds light on standards developed by the Court under each of the above-mentioned provisions and, for the purpose of illustration, offers short comments, and case briefs of *Khlaifia and Others v. Italy*,[438] *Ilias and Ahmed v. Hungary,*[439] and *Tarakhel v. Switzerland*.[440]

PROTOCOL NO. 4 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 4
Prohibition of Collective Expulsion of Aliens

Collective expulsion of aliens is prohibited.

1. Purpose of the Prohibition

According to the established case-law under the Convention, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.[441]

436 Jaya Ramji-Nogales, "Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights", 20 *ASIL Insights* 1, (2016), available at https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights

437 *A. A. and Others v. the former Yugoslav Republic of Macedonia,* App. no. 55798/16, Communicated on 23 January 2017.

438 *Khlaifia and Others v. Italy,* App. No. 16483/12, Judgment of 15 December 2016.

439 *Ilias and Ahmed v. Hungary*, App. no. 47287/15, Judgment of 14 March 2017.

440 *Tarakhel v. Switzerland*, App. no. 29217/12, Judgment of 4 November 2014.

441 *Hirsi Jamaa and Others v. Italy,* para. 177.

Originally, the prohibition was inspired by the massive expulsion of peoples as a result of the Second World War. The Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history".[442] It was "agreed that the adoption of [Article 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past".[443] However, Article 4 no longer requires that expulsion be on a massive scale to be collective.[444]

2. Who is an Alien?

Article 4 of Protocol No. 4 applies to all aliens – not only to those who lawfully reside within the territory of a Contracting State, but also to "all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality".[445] Therefore, for the purpose of its application, it is irrelevant whether an applicant is lawfully or unlawfully in the territory of a state, whether he or she is a resident or non-resident in the territory of that state, or whether he or she is or is not part of a collective group.[446] Thus, the Court's case-law clearly indicates that it has so far applied Article 4 of Protocol No. 4 to asylum seekers and migrants irrespective of whether they were lawfully resident in the respondent State or not, as well as to those who were intercepted on the high seas.[447] "Aliens" also include stateless persons.[448]

It is important to emphasise that Article 4 of Protocol No. 4 does not deal with the freedom of movement of persons "lawfully within the territory of a State" (this is the subject of Article 2 of Protocol No. 4). Nor does it concern individual expulsions of those who are lawful residents in the territory of a State (this is the matter of Article 1 of Protocol No. 7 to the Convention).

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442 See Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsion of Aliens, European Court of Human Rights, updated on 20 April 2017, p. 5, available at http://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf

443 *Hirsi Jamaa and Others v. Italy,* para. 174.

444 Hélène Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 2007, p. 34.

445 *Hirsi Jamaa and Others v. Italy,* para. 174.

446 Lambert, *op. cit.*, p. 35.

447 Guide on Article 4 of Protocol No. 4, *op. cit.*, p. 6.

448 Harris, et al., *op. cit.*, p. 961.

3. Definition of "Collective Expulsion"

According to the drafters of Protocol No. 4, the word "expulsion" should be interpreted "in the generic meaning in current use (to drive away from a place)". While this definition is contained in the section relating to Article 3 of the Protocol No. 4, the Court has concluded that it can also be applied to Article 4 of the same Protocol.[449]

According to the definition established by the former European Commission of Human Rights, and now applied by the Court, "collective expulsion" is "any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".[450] That does not, however, mean that where the latter condition is satisfied, the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.[451]

The fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.[452]

One should bear in mind that the classification of the procedure in domestic law is irrelevant for the application of Article 4 of Protocol No. 4. Thus, in *Khlaifia and Others v. Italy,* the Court emphasised that the fact that the procedure which the applicants had been subjected to what was classified in domestic law as a "refusal of entry with removal" and not as an "expulsion" did not oblige the Court to depart from its definition.[453] The Court observed that there was no doubt that the applicants, who had been on Italian territory, were removed from Italy and returned to Tunisia against their will, which constituted an "expulsion" within the meaning of Article 4 of Protocol No. 4.[454]

4. Exterritorial Application

The prohibition of collective expulsion applies extraterritorially: "where, [...] the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to

449 *Hirsi Jamaa and Others v. Italy,* para. 174.
450 *Čonka v. Belgium*, App. No. 51564/99, Judgment of 5 February 2002, para. 59.
451 *Ibid*.
452 *Sultani v. France*, App. No. 45223/05, Judgment of 20 September 2007, para. 81.
453 *Khlaifia and Others v. Italy,* paras. 243–244.
454 *Ibid*., para. 244.

accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion."[455] The Court came to this conclusion in *Hirsi Jamaa v. Italy*, its landmark case on the protection of migrants entering Europe and the first in which it had to consider whether the prohibition of collective expulsion of aliens, envisaged in Article 4 of Protocol No. 4, applied when the expulsion took place outside national territory, namely on the high seas.[456]

The Court did not deny that the notion of "jurisdiction" was principally territorial, as was the notion of expulsion, in the sense that expulsions were most often conducted from national territory.[457] However, it has ruled that the extraterritorial application of Article 4 of Protocol No. 4, is justified on the following grounds:

- The *travaux préparatoires* do not preclude extraterritorial application of Article 4 of Protocol No. 4.
- The purpose and meaning of Article 4 of Protocol No. 4 must be analysed on the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions.
- The fact is that "migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration."
- If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, "a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, [...] on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase."
- Therefore, "to conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole."
- Finally, "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by

455 *Hirsi Jamaa v. Italy,* para. 178.

456 To recall, the purpose of Article 4 was envisaged to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history", that is, to prohibit the expulsion of aliens residing lawfully in the national territory.

457 *Hirsi Jamaa v. Italy,* para. 178.

no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."[458]

5. Proceedings before the Court

In the proceedings before the Court, which have been instituted with regard to the prohibition of collective expulsion, the Court will first determine whether the application falls within the scope of Article 4 of Protocol No. 4, and if it does, it will proceed to determine whether the prohibition of collective expulsion has been violated.

So far, the Court has found a violation of Article 4 of Protocol No. 4 only in several cases.[459] The expulsions targeted Roma families from Belgium[460], Georgian nationals from Russia[461], while, in two cases, the violation concerned the expulsion of an entire group (migrants and asylum-seekers) without adequate verification of the individual identities of the group members.[462]

One should note that if the persons concerned have had an individual examination of their personal circumstances, no violation will be found.[463] Thus, in *M. A. v. Cyprus*, the Court noted that the fact that all the persons concerned were taken together to the police headquarters and that the authorities decided to deport them in groups did not render their deportation a collective measure within the meaning established in the Court's case-law.[464] Moreover, according to the Court, the fact that the deportation orders and the corresponding letters were couched in stereotype and, therefore, identical terms and did not specifically refer to the earlier decisions regarding the asylum procedure, was not itself indicative of a collective expulsion.[465] In addition, the mere fact that a mistake had been made in relation to the status of one applicant, who was lawfully in Cyprus at the relevant time, could not be taken as showing that there had been a collective expulsion.[466]

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458 *Ibid*., paras. 174–178.

459 Guide on Article 4 of Protocol No. 4, p. 7.

460 *Čonka v. Belgium*, *op. cit*.

461 *Georgia v. Russia*, App. no. 13255/07, Judgment of 3 July 2014; *Shioshvili and Others v. Russia*, App. no. 19356/07, Judgment of 20 December 2016; and *Berdzenishvili and Others v. Russia*, App. no. 14594/07, Judgement of 20 December 2016.

462 See *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece,* App. no. 16643/09, Judgment of 21 October 2014.

463 Guide on Article 4 of Protocol No. 4, *op. cit*., p. 9.

464 *M. A. v. Cyprus*, App. no. 41872/10, Judgment of 23 July 3013, para. 254.

465 *Ibid*.

466 *Ibid*., paras. 134 and 254. See also Guide on Article 4 of Protocol No. 4, *op. cit*., p. 9.

However, the Court has ruled that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances. The requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State, despite the fact that the orders were relatively simple and standardised.[467]

Note should also be taken of the fact that the Court found no violation of Article 4 of Protocol No. 4 in the absence of any expulsion order from a court or any other authority against the applicants, even if an administrative practice in place at the relevant time had led the applicants to fear arrest, detention and expulsion.[468]Accordingly, "although the situation of the applicants in itself might contain elements of compulsion to leave, it could not be equated with an expulsion decision or other official coercive measure."[469]

EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 3
Prohibition of Torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The prohibition of inhuman or degrading treatment is a fundamental value in democratic societies.[470] It is also a value of civilisation closely bound up with respect for human dignity, which is a part of the very essence of the Convention.[471] The prohibition in question is ***absolute***, for no derogation from it is permissible even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime, irrespective of the conduct of the person concerned.[472]

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467 *Khlaifia and Others v. Italy*, para. 248.

468 See *Shioshvili and Others v. Russia*, paras. 70–72, and *Berdzenishvili and Others v. Russia*, paras. 81–82. See also Guide on Article 4 of Protocol No. 4, *op. cit.*, p. 9.

469 Guide on Article 4 of Protocol No. 4, *op. cit.*, p. 9.

470 See, *e.g. Selmouni v.* France, App. no. 25803/94, Judgment of 20 September 2007, para. 95; *El-Masri v. the former Yugoslav Republic of* Macedonia, App. no. 39630/09, Judgment of 13 December 2012, para. 195.

471 *Bouyid v. Belgium,* App. no. 23380/09, Judgment of 28 September 2015, paras. 81 and 89–90.

472 *Chahal v. the United Kingdom*, App. no. 22414/93, Judgment of 15 November 1996, para. 79.

In principle, the prohibition of inhuman or degrading treatment may be at stake in situations where the direct consequence of a measure of expulsion of an alien entails the violation of Article 3 of the Convention:[473]

1. The first situation is where an alien is subject to an expulsion order to a country where "substantial grounds have been shown for believing that she or he would face a real risk of being subject to treatment contrary to Article 3."[474]

2. The second situation involves cases of successive expulsion of an alien: "in certain circumstances, the repeated expulsion of a foreigner without any identification and travel papers, and whose state of origin is unknown or refuses re-entry to its territory, may raise a problem with respect to Article 3."[475] The successive expulsion of aliens may entail a violation of Article 3 particularly when it appears that in the process of removal, the alien runs the risk of being sent to a third "unsafe" country. According to Council Directive 2005/85/EC of 1 December 2005, EU Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

   (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

   (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

   (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

   (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.[476]

3. The third situation is where an alien is subject to an expulsion order but is in no physical condition to travel.[477]

4. The fourth situation concerns the manner in which an expulsion is carried out.[478] On this account, the Court has emphasised:

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473 Lambert, *op. cit.,* pp. 43–44.

474 *Ibid*. See also *Chahal v. the United Kingdom*, para. 80.

475 *Ibid*., p. 49.

476 Article 27 of the Council Directive 2005/85/EC of 1 December 2005, OJ 13 December 2005, L 326/13–34 on minimum standards on procedures in member states for granting and withdrawing refugee status.

477 Lambert, *op. cit*., p. 50.

478 *Ibid*., pp. 50–53.

> "The state must ensure that a person is detained in conditions which are compatible with respect for his human dignity; that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured." [479]

The Court has frequently addressed the migrants' claims under Article 3 of the Convention in cases involving humanitarian emergencies in a migration crisis. On several occasions, it found it important to emphasise:

> "[...] having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision, which requires that persons deprived of their liberty must be guaranteed conditions that are compatible with respect for their human dignity [...] even treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties related to a migrant crisis, may entail a violation of Article 3 of the Convention."[480]

DETENTION PENDING EXPULSION

ARTICLE 5
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. [...]

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[...]

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479 *Kalashnikov v. Russia,* App. no. 47095/99, Judgment of 15 July 2002, para. 95.

480 *Khlaifia and Others v. Italy*, para. 184.

Article 5(1) of the Convention is concerned with a person's physical liberty. Its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary manner.[481] The difference between deprivation of liberty and restrictions on freedom of movement under Article 2 of Protocol No. 4 is merely one of degree or intensity, and not one of nature or substance. Article 5(1)(f) of the Convention recognises the power of states to detain aliens in order to prevent unauthorised entry or with a view to deportation or extradition. Apart from Article 5(1)(f) of the Convention, paragraphs 2 and 4 of that Article may also be violated in cases regarding expulsion of aliens.

The first issue the Court must determine in detention cases is whether there is a deprivation of liberty in the case at hand. In order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question.[482]

Now, Article 5(1)(f) permits the State to control the liberty of aliens in an immigration context.[483] Detention in this context will not be arbitrary if it is said that it is for immigration purposes.[484] However, any deprivation of liberty under this provision will be justified only as long as expulsion proceedings are in progress. If such proceedings are not prosecuted with "due diligence", the detention will cease to be permissible under Article 5(1)(f) of the Convention.[485]

The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and to the request that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.[486] In sum, any deprivation of liberty must be effected "in accordance with a procedure prescribed by law".

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481 *Medvedyev and Others v. France*, App. no. 3394/03, Judgment of 29 March 2010, para. 73. Sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. For the whole text of Article 5 of the Convention, see the Appendix to this Study.

482 *Stanev v. Bulgaria*, App. no. 36760/06, Judgment of 17 January 2012, para. 115.

483 See *Saadi v. the United Kingdom*, App. no. 13229/03, Judgment of 29 January 2008, para. 43, *A. and Others v. the United Kingdom*, App. no. 3455/05, Judgment of 19 February 2009, paras. 162–163, and *Abdolkhani and Karimnia v. Turkey*, App. no. 30471/08, Judgment of 22 September 2009, para. 128.

484 Harris, et al., *op. cit.*, p. 305.

485 *A. and Others v. the United Kingdom*, para. 164.

486 *Stanev v. Bulagaria*, para. 14, and *L. M. v. Slovenia*, App. no. 32863/05, Judgment of 12 June 2014, para. 121.

Article 5(2) of the Convention lays down an elementary safeguard: any person who has been arrested should know why s/he is being deprived of his liberty. S/he must be told, in simple, non-technical language that she/he can understand, the essential legal and factual grounds for deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with Article 5(4) of the Convention.[487] Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.[488]

Article 5(4) of the Convention entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions that are essential for the "lawfulness" of their deprivation of liberty. The notion of "lawfulness" under Article 5(4) has the same meaning as in Article 5(1) of the Convention.

Note that Article 5(4) does not guarantee a right to a judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1) of the Convention.[489] The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful.[490] Article 5(4) also secures to persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a "court". In principle, since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible.[491]

ARTICLE 8
Right to respect for private and family life

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

487 *L. M. v. Slovenia*, paras. 142–143.

488 See *Čonka v. Belgium*, para. 50.

489 *E. v. Norway*, App. no. 11701/85, Judgment of 29 August 1990, para. 50.

490 See *e.g. Chahal v. the United Kingdom*, para. 130, and *A. and Others v. the United Kingdom*, para. 202.

491 *Fuchser v. Switzerland*, App. no. 55894/00, Judgment of 13 July 2006, para. 43.

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to the Court, "[...] as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Moreover, where immigration is concerned, Article 8 of the Convention cannot be considered to impose on a State a general obligation to respect the choice of married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered."[492]

When considering an applicant's claim, the Court will first establish whether there has been an interference with the right to respect for private and family life under Article 8(1) of the Convention. It needs to be noted here that the Court is prone to recognise that the act of expulsion (as well as deportation or a permanent exclusion from a territory) *per se* constitutes an interference if the act is certain and enforceable.[493]

When the Court determines that there has been an interference with the applicant's right, and because the right to respect for private and family life is not unlimited, it will proceed to consider whether the interference can be justified under Article 8(2), that is, whether the interference has been "in accordance with the law", whether it has been motivated by a legitimate aim listed in Article 8(2), and whether it has been "necessary in a democratic society", *i.e*., proportionate to the legitimate aim pursued. What matters in such cases is the question of a fair balance between the applicants' interest and the public interest in expulsion.[494] The Court will balance the applicant's right against the community's interest after it has established lack of respect for the right to private and family life, *i.e*. when considering whether the interference has been "necessary in a democratic society".[495]

ARTICLE 13
Right to an effective remedy

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

492 *Gül v. Switzerland*, App. no. 23218/94, Judgment of 19 February 1996, para. 38.
493 Lambert, *op. cit*., p. 68.
494 For more see Harris, et al., *op*. *cit*., pp. 575–578.
495 Lambert, *op. cit*., p. 68.

Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms. Under Article 13 of the Convention, the notion of an effective remedy requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.[496] Therefore, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.[497]

In *Khlaifia and Others v. Italy,* the Court observed that the scope of the States' obligations varied depending on the nature of the applicant's complaint.[498] However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.[499] In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.[500]

According to the Court's case law, a remedy must have a suspensive effect to meet the requirements of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.[501] However, the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4, where an applicant does not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country.[502] In such a situation, the Convention does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum.[503]

One should have in mind that the absence of any domestic procedure enabling potential asylum-seekers to lodge complaints under Article 3 of the

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496 Guide on Article 4 of Protocol No. 4, *op. cit*., p. 10.

497 *Čonka v. Belgium*, para. 79.

498 *Khlaifia and Others v. Italy*, para. 268.

499 *Ibid*.

500 *Hirsi Jamaa and Others*, para. 197.

501 *Čonka v. Belgium*, paras. 77–85.

502 Guide on Article 4 of Protocol No. 4, *op. cit*., p. 10. See also *Khlaifia and Others v. Italy*, para. 281.

503 Guide on Article 4 of Protocol No. 4, *op. cit*., p. 10.

Convention (prohibiting torture and inhuman or degrading treatment) and Article 4 of Protocol No 4 (prohibiting collective expulsion) with a competent authority, and to obtain a thorough and rigorous assessment of their requests before the enforcement of the removal, may also lead to a violation of Article 13 of the Convention.[504]

Finally, in some circumstances, there is a clear link between the enforcement of collective expulsions and the fact that the persons concerned were effectively prevented from applying for asylum or from having access to any other domestic procedure which met the requirements of Article 13 of the Convention.[505] Yet, when the finding of a violation of Article 4 of Protocol No. 4 and of Article 5(4) of the Convention in itself means that there has been a lack of effective and accessible remedies, the Court may also consider that in a particular case there is no need to examine this aspect separately under Article 13 of the Convention.[506]

II SELECTED CASES: COMMENTS AND CASE BRIEFS

In the case of *Khlaifia and Others v. Italy,* the Court delivered a ruling on the protection of migrants who were detained pending expulsion. It emphasised that an increased influx of migrants could not justify violations of the Convention – in particular any deprivation of liberty or the downgrading of human dignity. According to the Court, in accordance with the general principle of legal certainty or the request to protect the applicants from arbitrary treatment, Article 5(1) of the Convention requires a legal basis to exist in domestic law for ordering the detention of the applicants, while Article 5(2) of the Convention envisages that the applicants must be provided with any information as to the legal or factual basis of their detention. In addition, the applicants' right to challenge the detention order must be effective, as provided by Article 5(4) of the Convention. The Court also considered the conditions of the applicants' detention and observed that, given the absolute and non-derogable nature of Article 3 of the Convention, the State was responsible for ensuring that detainees were kept in conditions compatible with respect for their human dignity. The judgment, however, indicates that, as far as collective expulsion of aliens is concerned, the Court is ready to afford a greater margin of appreciation to national authorities in situations in which they deal with mass migrations.

504 *Hirsi Jamaa v. Italy*, paras. 201–207; Guide on Article 4 of Protocol No. 4, *op. cit*., p. 10.
505 *Ibid*.
506 Guide on Article 4 of Protocol No. 4, *op. cit*., p. 10; *Georgia v. Russia*, para. 212.

Although the judgment delivered by the Court in the case of *Ilias and Ahmed v. Hungary* is not final yet (Hungary has asked for its referral to the Grand Chamber), its potentials to influence the asylum seekers' cases based on the safe third country concept are rather strong. The judgment deals with the concept of "safe third country" in the light of the principle of *non-refoulement* enshrined in Article 3 the Convention. The Court ruled that States could not send asylum seekers back to allegedly safe third countries solely on the basis of their own legislation or an agreement, without taking into consideration all facts and findings, particularly those established by relevant international organisations. Moreover, the Court emphasised that the ratification of the 1951 Refugee Convention by a certain country was not sufficient reason to qualify that country as safe. The judgment indicates that Serbia cannot be regarded as "safe third country" because it lacks a fair and efficient asylum procedure and there is a real risk that asylum seekers are summarily returned to the former Yugoslav Republic of Macedonia[507]. In regard to the former Yugoslav Republic of Macedonia, the Court emphasised that, in 2015, the UNHCR found that, despite positive developments, significant weaknesses persisted in the national asylum system in practice; that the country was unable to ensure that asylum-seekers had access to a fair and efficient asylum procedure; and that the inadequate asylum procedure resulted in low recognition rates, even for the minority of asylum-seekers who stayed in the country to wait for the outcome of their asylum claims. In regard to Greece, the Court noted that, although recent developments demonstrated an improvement in the treatment of asylum-seekers in Greece conducive to the gradual resumption of transfers to the country, this had not yet been the case at the material time.

In *Tarakhel v. Switzerland*, the Court ruled on the compatibility of the EU Dublin II Regulation with the Convention. The case involved the transfer of an Afghan family (a couple and their six children) from Switzerland to Italy. Relying on Article 3 of the Convention, the applicants claimed that, if they were returned to Italy "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum seekers in Italy. The Court emphasised that "[I]n the case of "Dublin" returns, the presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can [...] validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country." It ruled that "were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian

507 The former Yugoslav Republic of Macedonia is ReSPA Member as Macedonia.

authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention."

CASE OF KHLAIFIA AND OTHERS V. ITALY
(Judgment of 15 December 2016)

CASE BRIEF

I FACTS

The applicants are three Tunisian nationals, Mr. Khlaifia, Mr. Tabal and Mr. Sfar. On 16 September 2011, in the case of the first applicant, then the next day, in the case of the second and the third applicants, the applicants left Tunisia with others on board rudimentary vessels heading for the Italian coast. After several hours at sea, their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants arrived on the island on 17 and 18 September 2011 respectively. They were transferred to an Early Reception and Aid Centre ("the Centre") on the island of Lampedusa where, after giving them first aid, the authorities proceeded with their identification. The Government asserted that on this occasion individual "information sheets" were filled in for each of the migrants concerned. However, this was disputed by the applicants. The applicants were accommodated in a part of the Centre reserved for adult Tunisians. The Centre was kept permanently under police surveillance, making any contact with the outside world impossible.

The applicants remained in the Centre until 20 September 2011, when a violent revolt broke out among the migrants. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa for the night. At dawn on 21 September they managed, together with the other migrants, to evade the police surveillance and walk to the village of Lampedusa. From there, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were first taken back to the reception Centre, and then to Lampedusa airport.

On the morning of 22 September 2011, the applicants were flown to Palermo. After disembarking they were transferred to ships. The first applicant was placed on the *Vincent*, with some 190 other people, while the second and third applicants were put on board the *Audace*, with about 150 others. They were allegedly insulted and ill-treated by the police, who kept them

under permanent surveillance, and they claimed not to have received any information from the authorities. The applicants remained on the ships for a few days. On 27 September 2011, the second and third applicants were taken to Palermo airport pending their removal to Tunisia; the first applicant followed suit on 29 September 2011. Before boarding the planes, the migrants were received by the Tunisian Consul. In their submission, the Consul merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011.

In their application, the applicants asserted that at no time during their stay in Italy had they been issued any document. The Italian Government, however, produced three refusal-of-entry orders issued in respect of the applicants and dated 27 and 29 September 2011. On their arrival at Tunis airport, the applicants were released.

A number of anti-racism associations filed a complaint about the treatment to which the migrants had been subjected, after 20 September 2011, on the ships *Audace*, *Vincent* and *Fantasy*. Criminal proceedings for abuse of power and unlawful arrest (Articles 323 and 606 of the Criminal Code) were opened against a person or persons unknown. On 3 April 2012, the public prosecutor sought to have the charges dropped. In a decision of 1 June 2012, the Palermo preliminary investigations judge granted the public prosecutor's request and concluded that the case file contained no evidence of the physical and mental elements of the offences provided for in Articles 323 and 606 of the Criminal Code.

Two other migrants, in respect of whom refusal-of-entry orders had been issued, challenged those orders before the Agrigento Justice of the Peace. In two decisions of 4 July and 30 October 2011, respectively, the Justice of the Peace annulled those orders.

Before the European Court of Human Rights, the applicants alleged in particular that they had been confined in a reception centre for irregular migrants in breach of Articles 3 and 5 of the Convention. They also argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights. The Italian Government raised an objection that domestic remedies had not been exhausted, on the ground that the applicants had not appealed to the Italian judicial authorities against the refusal-of-entry orders.

On 1 September 2015, a Chamber of the Court delivered a judgment. The Government requested the referral of the case to the Grand Chamber, which was granted.

II LEGAL ISSUES

(1) Whether the applicants had been deprived of their liberty in a manner that was incompatible with Article 5(1) of the Convention.

(2) Whether the fact that the applicants allegedly had not had any kind of communication with the Italian authorities throughout their stay in Italy amounted to a violation of Article 5(2) of the Convention.

(3) Whether the fact that the applicants allegedly had at no time been able to challenge the lawfulness of their deprivation of liberty amounted to a violation of Article 5(4) of the Convention.

(4) Whether the applicants had been subjected to inhuman and degrading treatment during their detention in the Centre on the island of Lampedusa and on the ships *Vincent* and *Audace*, in violation of Article 3 of the Convention.

(5) Whether the applicants were victims of collective expulsion, in violation of Article 4 of Protocol No. 4.

(6) Whether the fact that the applicants allegedly had not been afforded an effective remedy under Italian law by which to raise their complaints under Articles 3 and 5 of the Convention and under Article 4 of Protocol No. 4 amounted to a violation of Article 13 of the Convention.

III HOLDING

(1) The Government is estopped from raising the objection that domestic remedies have not been exhausted (unanimously);

(2) The Government's preliminary objection that Article 5 is inapplicable in the present case has been dismissed (unanimously);

(3) There has been a violation of Article 5(1) of the Convention (unanimously);

(4) There has been a violation of Article 5(2) of the Convention (unanimously);

(5) There has been a violation of Article 5(4) of the Convention (unanimously);

(6) There has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held at the Centre (unanimously);

(7) There has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held on the ships *Vincent* and *Audace* (unanimously);

(8) There has been no violation of Article 4 of Protocol No. 4 to the Convention (by sixteen votes to one);

(9) There has been a violation of Article 13 of the Convention taken together with Article 3 of the Convention (unanimously);

(10) There has been no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4 (by sixteen votes to one);

(11) The respondent State is to pay to each applicant, within three months, EUR 2,500 plus any tax that may be chargeable, in respect of non-pecuniary damage (by fifteen votes to two);

(12) The respondent State is to pay to the applicants jointly, within three months, EUR 15,000, plus any tax that may be chargeable to them, in respect of costs and expenses (unanimously);

(13) The remainder of the applicants' claim for just satisfaction is dismissed (unanimously).

III REASONING

(a) Reasons why the Court rejected the preliminary objection

The Court confirmed the Chamber's ruling that the Government were estopped from raising the objection that domestic remedies had not been exhausted because, during the proceedings, the Government did not indicate any impediment preventing them from referring, in their initial observations on the admissibility and merits of the case, to a failure by the applicants to challenge the refusal-of-entry orders.

(b) Reasons why the Court found the application admissible under Article 5 of the Convention

The Court rejected the Government's arguments that Article 5 was inapplicable because the applicants had not been deprived of their liberty, that they had been subjected neither to "arrest" nor "detention", but merely a "holding"' measure. According to the Government, the applicants had been rescued on the high seas and taken to the island of Lampedusa to assist them and to ensure their physical safety.

The Court has emphasised that, in proclaiming the right to liberty, the first paragraph of Article 5 is concerned with a person's physical liberty and that its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary fashion. The difference between deprivation of liberty and restrictions on freedom of movement under Article 2 of Protocol No. 4 is merely one of

degree or intensity, and not one of nature or substance. In order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question.

The Court noted that the Government acknowledged that the Italian authorities had kept the Centre under surveillance and did not dispute the applicants' allegation that they had been prohibited from leaving the Centre and the ships *Vincent* and *Audace*.[508] The Court found that the duration of the applicants' confinement in the Centre and on the ships, lasting about twelve days in the case of the first applicant and about nine days in that of the second and third applicants, was not insignificant. Therefore, it concluded that (a) the classification of the applicants' confinement in domestic law could not alter the nature of the constraining measures imposed on them; (b) the applicability of Article 5 of the Convention could not be excluded by the fact, relied on by the Government, that the authorities' aim had been to assist the applicants and ensure their safety; and, (c) even measures intended for protection or taken in the interest of the person concerned may have been regarded as a deprivation of liberty.

(c) Reasons why the Court found a violation of Article 5(1) of the Convention

The Court rejected the Government's argument that the case did not fall within the scope of Article 5(1)(f) of the Convention because the applicants had not been held pending deportation or extradition, but had, on the contrary, been temporarily allowed to enter Italy. The Court first summarised the applicable principles: any deprivation of liberty under the second limb of Article 5(1)(f) will be justified only as long as deportation or extradition proceedings are in progress; if such proceedings are not prosecuted with "due diligence", the detention will cease to be permissible under Article 5(1)(f); the deprivation of liberty must also be "lawful"; in laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5(1) primarily requires any arrest or detention to have a legal basis in domestic law; these words do not merely refer back to domestic law, they also relate to the quality of the law, requiring it to be compatible with the rule of law; where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied.

508 The Court also made reference to a report by the Italian Senate's Special Commission, which referred to the "prolonged confinement", "inability to communicate with the outside world" and "lack of freedom of movement" of the migrants placed in the Lampedusa reception centres. The same applied to the ships *Vincent* and *Audace*, which, according to the Government themselves, were to be regarded as the "natural extension" of the Centre.

According to the Court, the deprivation of liberty in the applicants' case was covered by Article 5(1)(f). The applicants had entered Italy and the refusal-of-entry orders concerning them stated expressly that they had entered the country by evading border controls, and, therefore, unlawfully. Moreover, the procedure adopted for their identification and return manifestly sought to address that unlawful entry.

The Court went on to examine whether the applicants' detention had a legal basis in Italian law. It determined that Legislative Decree no. 286 of 1998 could not have constituted the legal basis for the applicants' deprivation of liberty, which the Government did not dispute. To the extent that the Government took the view that the legal basis for holding the applicants on the island of Lampedusa was the bilateral agreement between Italy and Tunisia of April 2011, the Court noted that this agreement had not been made public. It therefore had not been accessible to the applicants, who, accordingly, could not have foreseen the consequences of its application. In addition, it did not contain any reference to the possibility of administrative detention or to the related procedures. The Court further observed that its finding that the applicants' detention was devoid of legal basis in Italian law had been confirmed in the report by the Italian Senate's Special Commission.[509] The Court found that the applicants had not only been deprived of their liberty without a clear and accessible legal basis, but had also been unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down in Article 13 of the Italian Constitution.

In the light of the foregoing, the Court found that the provisions applying to the detention of irregular migrants were lacking in precision, that legislative ambiguity had given rise to numerous situations of *de facto* deprivation of liberty and the fact that placement in the Centre was not subject to judicial supervision could not, even in the context of a migration crisis, be compatible with the aim of Article 5 of the Convention: to ensure that no one should be deprived of his or her liberty in an arbitrary fashion. Those considerations were sufficient for the Court to find that the applicants' deprivation of liberty did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. Accordingly, there had been a violation of Article 5(1) of the Convention in the present case.

(d) Reasons why the Court found a violation of Article 5(2) of the Convention

The applicants complained that they had not had any kind of communication with the Italian authorities throughout their stay in Italy. The Court observed

509 The Special Commission noted that stays at the Lampedusa Centre, which in principle should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his or her presence in Italy, sometimes extended to over twenty days "without there being any formal decision as to the legal status of the person being held."

that it has already found, under Article 5(1) of the Convention, that the applicants' detention had no clear and accessible legal basis in Italian law. In the Court's view, although the applicants had been informed about their legal status and the prospect of their imminent return, information about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the legal basis for the migrant's deprivation of liberty. According to the Court, similar considerations were applicable to the refusal-of-entry orders, because they did not include any reference to the applicants' detention or to the legal and factual reasons for such a measure.

(e) Reasons why the Court found a violation of Article 5(4) of the Convention

As to the applicants' allegation that at no time had they been able to challenge the lawfulness of their deprivation of liberty, the Court reiterated that Article 5(4) entitled detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions essential for the "lawfulness", in Convention terms, of their deprivation of liberty. Article 5(4) also secures to persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a court and to have their release ordered if the detention is not lawful.

In cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance. The Italian legal system did not provide the applicants with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty. As an additional consideration, the Court noted, first, that the refusal-of-entry orders did not make any reference to the applicants' detention or to the legal or factual reasons for such a measure, and, second, that the orders had only been announced to the applicants when it was too late, shortly before they were returned by plane.

(f) Reasons why the Court found no violation of Article 3 of the Convention

The Court has already had occasion to apply the principles to cases that are comparable to that of the applicants, concerning in particular the conditions in which would-be immigrants and asylum-seekers were held in reception or detention centres.[510] Therefore, in the present case, the Court reiterated

510 In *M. S. S. v. Belgium and Greece,* the Court examined the detention of an Afghan asylum-seeker at the Athens international airport for four days and found a violation of

that, having regard to the absolute character of Article 3, an increasing influx of migrants could not absolve a State of its obligations under that provision. The Court then examined separately the two situations at issue, namely the reception conditions in the Centre and those on the ships *Vincent* and *Audace*.

In the light of the available information, the Court took the view that the conditions in the Centre could not be compared to those which justified its finding of a violation of Article 3 of the Convention in *M. S. S. v. Belgium and Greece*. It also concluded that the conditions in which the applicants had been held on the ships *Vincent* and *Audace* did not constitute inhuman or degrading treatment.

(g) Reasons why the Court found no violation of Article 4 of Protocol No. 4 to the Convention

The applicants submitted that they had been victims of collective expulsion. According to the Court's case-law, collective expulsion is to be understood as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group". The purpose of Article 4 of Protocol No. 4 is to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority. In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions had taken into consideration the specific situation of the individuals concerned. As the Court has previously observed, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion, if each person concerned has been given the opportunity to put arguments against his or her expulsion to the competent authorities.

The Court addressed the Government's argument that Article 4 of Protocol No. 4 was not applicable because the procedure, to which the applicants had been subjected, was classified as a "refusal of entry with removal" and not as an "expulsion". It observed that there was no doubt that the applicants, who had been on Italian territory, had been removed from that State and returned to Tunisia against their will, which constituted an "expulsion" within the meaning of Article 4 of Protocol No. 4.

Article 3 of the Convention, referring to the cases of ill-treatment by police officers and to the conditions of detention as described by a number of international organisations as "unacceptable". *M. S. S. v. Belgium and Greece*, App. no. 30696/09, Judgment of 21 January 2011.

As to the issue of whether the expulsion was “collective” in nature, the Court has indicated that “collective expulsion means expulsion of aliens, as a group”. It established that the applicants had not disputed the fact that they had undergone identification on two occasions: immediately after their arrival at the Centre by Italian civil servants and before they boarded the planes for Tunis, by the Tunisian Consul. The Court was of the opinion that at the time of their first identification, which, according to the Government, had consisted in taking their photographs and fingerprints, or at any other time during their confinement in the Centre and on board the ships, the applicants had had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned.

The Court also pointed out that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State. In the present case, the applicants, who could reasonably have expected to be returned to Tunisia in view of the conditions of their arrival on the Italian coast, had remained in Italy between nine and twelve days. Even assuming that they had encountered objective difficulties in the Centre or on the ships, the Court was of the view that, during that period of time, the applicants had had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.

The Court further noted that, before boarding the planes for Tunis, the applicants had been received by the Tunisian Consul, who had recorded their identities and that they had thus undergone a second identification. Even though it had been carried out by a representative of a third State, this later check enabled the migrants’ nationality to be confirmed and gave them a last chance to raise arguments against their expulsion.

In the Court’s view, the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. It was therefore not unreasonable in itself for those orders to have been justified merely by the applicants’ nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in Article 10(4) of Legislative Decree no. 286 of 1998 (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds).

In sum, the applicants had undergone identification on two occasions, their nationality had been established, and they had been afforded a genuine and effective possibility of submitting arguments against their expulsion. Consequently, the Court found no violation of Article 4 of Protocol No. 4. This finding made it unnecessary for the Court to address the question of whether the agreement between Italy and Tunisia, which had not been made public, could be regarded as a "readmission" agreement within the meaning of the EU Return Directive and whether this could have implications under Article 4 of Protocol No. 4.

(h) Reasons why the Court found a violation of Article 13 of the Convention taken together with Article 3 of the Convention

The Court has stressed that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.

The Court noted that it declared admissible the applicants' complaints under the substantive head of Article 3 of the Convention. Even though it did not find a violation of Article 3, the complaints were "arguable" for the purposes of Article 13 of the Convention. The Court observed that the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the Centre or on the ships *Vincent* and *Audace*. An appeal to the Justice of the Peace against the refusal-of-entry orders would have served only to challenge the lawfulness of their removal. Moreover, those orders had been issued only at the end of their period of confinement.

(i) Reasons why the Court found no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4

In so far as the applicants complained of the lack of any effective remedy by which to challenge their expulsion from the perspective of its collective aspect, the Court noted that the refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Agrigento Justice of the Peace within a period of sixty days. There was no evidence before the Court to cast doubt on the effectiveness of that remedy in principle. However, while there was certainly a remedy available, it would

not “in any event” have suspended the enforcement of the refusal-of-entry orders, wherefore the Court had to determine whether the lack of suspensive effect, in itself, constituted a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4. It concluded that in the present case the lack of suspensive effect of a removal decision did not in itself constitute a violation of Article 13 of the Convention.

CASE OF ILIAS AND AHMED V. HUNGARY
(Judgment of 14 March 2017[511])

CASE BRIEF

I FACTS

The applicants, Mr. Ilias and Mr. Ahmed, both from Bangladesh, entered the territory of the European Union in Greece. From there, they transited through the former Yugoslav Republic of Macedonia to Serbia. Mr. Ilias spent some 20 hours on Serbian territory and Mr. Ahmed two days. On 15 September 2015, they arrived to the Röszke transit zone situated on the border between Hungary and Serbia. On the same day, they submitted applications for asylum.

From that moment on, the applicants stayed inside the transit zone, which they could not leave in the direction of Hungary. They alleged that the transit zone was, in their view, unsuitable for a stay longer than a day, especially in the face of their severe psychological condition. They claimed that they had no access to legal, social or medical assistance while staying in the zone. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had no major objections to the asylum seekers’ accommodation conditions in the Röszke zone.

The applicants, both illiterate, were interviewed at once by the asylum authority. Both applicants’ mother tongue was Urdu. By mistake, the first applicant was interviewed with the assistance of an interpreter in Dari, which he did not speak. According to the record of the meeting, the asylum authority gave the first applicant an information leaflet on asylum proceedings, which was also in Dari. The interview lasted two hours. An Urdu interpreter was present for the second applicant’s interview, which lasted 22 minutes.

By a decision delivered on the very same day of their arrival, the asylum authority rejected the applicants’ asylum applications, finding them inadmissible

511 The case has been referred to the Grand Chamber.

on the grounds that Serbia was to be considered a "safe third country" according to Government Decree no. 191/2015. (VII.21.) on safe countries of origin and safe third countries. The asylum authority ordered the applicants' expulsion from Hungary.

The applicants challenged the decision before the Szeged Administrative and Labour Court.[512] This court annulled the asylum authority's decisions and argued that the asylum authority should have analysed the actual situation in Serbia regarding asylum proceedings more thoroughly. It should also have informed the applicants of its conclusions at that point and afforded them three days to rebut the presumption of Serbia being a "safe third country" with the assistance of legal counsel.

On 23 September 2015, at the request of their lawyers, a psychiatrist commissioned by the Hungarian Helsinki Committee visited the applicants in the transit zone and interviewed them. Both applicants were diagnosed with post-traumatic stress disorder, and Mr. Ahmed as also having an episode of depression. The psychiatrist was of the opinion that the applicants' mental state was liable to deteriorate due to the confinement.

On 30 September 2015, the asylum authority again rejected the applications for asylum. As a consequence, the applicants' expulsion from Hungary was ordered. The applicants sought a judicial review again by the Szeged Administrative and Labour Court. On 5 October 2015, this court upheld the asylum authority's decision.

The final decision was served on the applicants on 8 October 2015. It was written in Hungarian but explained to them in Urdu. Escorted to the Serbian border by officers, the applicants subsequently left the transit zone for Serbia without physical coercion being applied. On 9 March 2016, the applicants' petitions for review were dismissed on procedural grounds, since the Supreme Court of Hungary held that it had no jurisdiction to review such cases.

II LEGAL ISSUES

(1) Whether the applicants' committal to the transit zone, allegedly devoid of any legal basis, amounted to deprivation of liberty, in breach of Article 5(1) of the Convention.

(2) Whether the alleged fact that the applicants' deprivation of liberty in the transit zone could not be remedied by appropriate judicial review amounted to a breach of Article 5(4) of the Convention.

512 They authorised two lawyers acting on behalf of the Hungarian Helsinki Committee to represent them in the judicial review procedure, but the authorities allowed the lawyers to enter the transit zone to consult with their clients after the court hearing.

(3) Whether the alleged conditions of the applicants' confinement in the Röszke transit zone amounted to inhuman and degrading treatment, in breach of Article 3 of the Convention.

(4) Whether the alleged lack of an effective remedy at the applicants' disposal to complain about the conditions of their detention in the transit zone amounted to a violation of Article 13 read in conjunction with Article 3 of the Convention.

(5) Whether the applicants' expulsion to Serbia, allegedly implemented under inadequate procedural safeguards, which had reportedly exposed them to a real risk of chain-*refoulement*, amounted to inhuman and degrading treatment, in breach of Article 3 of the Convention.

(6) Whether the alleged lack of an effective domestic remedy by which the applicants could have challenged their expulsion to Serbia amounted to a violation of Article 13 read in conjunction with Article 3 of the Convention.

III HOLDING (UNANIMOUSLY)

(1) The complaints under Article 5(1) and (4) of the Convention, Articles 3 and 13 of the Convention in respect of the conditions of detention at the Röszke transit zone and Article 3 of the Convention in respect of the applicants' expulsion to Serbia are admissible;

(2) There has been a violation of Article 5(1) of the Convention;

(3) There has been a violation of Article 5(4) of the Convention;

(4) There has been no violation of Article 3 of the Convention in respect of the conditions of detention at the Röszke transit zone;

(5) There has been a violation of Article 13 read in conjunction with Article 3 of the Convention in respect of the conditions of detention at the Röszke transit zone;

(6) There has been a violation of Article 3 of the Convention in respect of the applicants' expulsion to Serbia;

(7) There is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention taken together with Article 3 in respect of the applicants' expulsion to Serbia;

(8) Hungary is to pay, within three months from the date on which the judgment becomes final to each applicant, EUR 10,000, plus any tax that may be chargeable, in respect of non-pecuniary damage; to the applicants jointly, EUR 8,705 plus any tax that may be chargeable to the applicants, in respect of costs and expenses.

IV REASONING

(a) Reasons why the Court found a violation of Article 5(1) of the Convention

The Court rejected the Hungarian Government's argument that the applicants had been free to leave the territory of the transit zone in the direction of Serbia and that they had not been deprived of their personal liberty. The Court has already found that holding aliens in an international zone involves a restriction upon liberty which is not in every respect comparable to that obtained in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty.[513] In order to determine whether someone has been "deprived of his/her liberty" within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors.

The Court emphasised that the applicants in the present case had been confined for over three weeks to the border zone – a facility which, for the Court, bears a strong resemblance to an international zone, both being under the State's effective control irrespective of the domestic legal qualification. The mere fact that it was possible for them to leave voluntarily returning to Serbia, which never consented to their readmission, cannot rule out an infringement of the right to liberty. Moreover, the Court found that the applicants could not have left the transit zone in the direction of Serbia without unwanted and grave consequences, that is, without forfeiting their asylum claims and running the risk of *refoulement*, wherefore Article 5(1) of the Convention applied.

The Court went on to examine the compatibility of the deprivation of liberty found in the present case with Article 5(1) of the Convention. The first limb of Article 5(1)(f) permits the detention of an asylum-seeker or another immigrant prior to the State's grant of authorisation to enter. The Court reiterated that in relation to whether a detention was "lawful", including whether it was in accordance with "a procedure prescribed by law", Article 5(1) of the Convention referred not only to national law, but also, where appropriate, to other applicable legal norms, including those which had their source in international law. The Court further noted that Member States of the European Union should not hold a person in detention for the sole

513 See *Amuur v. France*, App. no. 19776/92 Judgment of 25 June 1996, para. 43, and *Riad and Idiab v. Belgium*, App. nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para. 68.

reason that s/he was an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

The applicants' detention in the transit zone lasted 23 days. According to the Government, section 71/A (1) and (2) of the Asylum Act provided sufficient legal basis for the measure. The Court, however, was not persuaded that these rules had any reference to the possibility of detention at the transit zone.

Although the Court accepted that the motives underlying the applicants' detention were to counter abuses of the asylum procedure, it, however, insisted that the applicants had been deprived of their liberty without any formal decision of the authorities and solely by virtue of an elastically interpreted general provision of the law – a procedure which, in the Court's view, felt short of the requirements enounced in its case-law. Therefore, the Court concluded that the applicants' detention could not be considered "lawful" for the purposes of Article 5(1) of the Convention and, consequently, ruled that there had been a violation of that provision.

(b) Reasons why the Court found a violation of Article 5(4) of the Convention.

The Court accepted the applicants' allegation that they had been unable to challenge the lawfulness of the measure in any kind of procedure. It noted that the applicants' detention had consisted in a *de facto* measure and that the proceedings suggested by the Government had concerned the applicants' asylum applications rather than the question of personal liberty. Therefore, it concluded that the applicants had not had at their disposal any "proceedings by which the lawfulness of [their] detention [could have been] decided speedily by a court".

(c) Reasons why the Court found no violation of Article 3 of the Convention in respect of the conditions of detention

In the applicants' view, the substandard conditions of reception in the transit zone amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. The Court first took into account the general principles applicable to the treatment of migrants in detention it had summarised in the judgment of *Khlaifia and Others v. Italy* and reiterated that, having regard to the absolute character of Article 3, an increasing influx of migrants could not absolve a State of its obligations under that provision, which required that persons deprived of their liberty had to be guaranteed conditions compatible

with respect for their human dignity. The Court noted that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had no major objections to accommodation of asylum seekers in the Röszke zone.

It further took cognisance of the opinion of the psychiatrist, who had found that the applicants were suffering from posttraumatic stress disorder, but noted that the alleged events in Bangladesh had occurred years before the applicants' arrival in Hungary, that the applicants had spent only a short time in Serbia and had not referred to any incidents in other countries. For the Court, the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time. In view of the satisfactory material conditions and the relatively short time involved, the Court concluded that the treatment complained of had not reached the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention and found no violation of Article 3 of the Convention.

(d) Reasons why the Court found a violation of Article 13 read in conjunction with Article 3 of the Convention

The applicants alleged that there had been no effective remedy at their disposal to complain about the conditions of their detention in the transit zone. The Court first noted that Article 13 of the Convention guaranteed the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief and that the remedy required by Article 13 must be "effective" in practice as well as in law. The Court observed that the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the transit zone and therefore found that there had been a violation of Article 13 taken together with Article 3 of the Convention.

(e) Reasons why the Court found a violation of Article 3 of the Convention in respect of the applicants' expulsion to Serbia

The applicants alleged that their expulsion to Serbia, implemented under inadequate procedural safeguards, had exposed them to a real risk of chain *refoulement*, which amounted to inhuman and degrading treatment in breach of Article 3 of the Convention. The Hungarian Government argued that,

since the applicants had already returned to Serbia but had submitted no complaint against that country in respect of the conditions of reception or of an impending expulsion to yet another country, they could not claim to be victims, for the purposes of Article 34, of a violation of their rights under Article 3 of the Convention on account of their expulsion to Serbia.

The Court noted that the mere fact that the applicants had already been expelled from Hungary did not release the Court from its duty to examine their complaints under Article 3 of the Convention. The Court thus considered that the applicants had retained their status of victim for the purposes of Article 34 of the Convention.

After having summarised the applicable principles in the present case, the Court proceeded to establish whether, at the time of their removal from Hungary on 8 October 2015, the applicants could have arguably asserted that their removal to Serbia would infringe Article 3 of the Convention.

The Court observed that the applicants were removed from Hungary on the strength of the Government Decree listing Serbia as a safe third country and establishing a presumption in this respect. However, the Court noted that it was incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk was ascertainable from a wide number of sources. Not only had the Hungarian authorities failed to perform this assessment in the determination of the individual risks; they had refused even to consider the merits of the information provided by the counsel, limiting their argument to the position of the Government Decree.

The Court then observed that, between January 2013 and July 2015, Serbia was not considered a safe third country by Hungary, based on the reports of international institutions on the shortcomings of asylum proceedings in Serbia. The 2015 legislative change, however, produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings. However, no convincing explanation or reasons had been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016. The Court observed that the UNHCR in 2012 urged States not to return asylum-seekers to Serbia, notably because the country lacked a fair and efficient asylum procedure and there was a real risk that asylum seekers were summarily returned to the former Yugoslav Republic of Macedonia.[514]

514 The Court cited here the following excerpts of a report prepared in August 2012 by the UNHCR:

"[...] UNHCR concludes that there are areas for improvement in Serbia's asylum system, noting that it presently lacks the resources and performance necessary to provide sufficient

Moreover, in regard to the former Yugoslav Republic of Macedonia, the Court emphasised that the UNHCR found in 2015 that, despite positive developments, significant weaknesses persisted in the asylum system in practice; that the country was unable to ensure that asylum-seekers had access to a fair and efficient asylum procedure; and that the inadequate asylum procedure resulted in low recognition rates, even for the minority of asylum-seekers staying in the country to wait for the outcome of their asylum claims.[515]

The Court also noted that the Hungarian authorities had not sought to rule out that the applicants, driven back through Serbia, might further be

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protection against refoulement, as it does not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure. Furthermore, given the state of Serbia's asylum system, Serbia should not be considered a safe third country, and in this respect, UNHCR urges States not to return asylum-seekers to Serbia on this basis [...] However, UNHCR received reports in November 2011 and again in February 2012 that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the former Yugoslav Republic of Macedonia [...] There have been other reports that the Serbian police have rounded up irregular migrants in Serbia and were similarly sent back to the former Yugoslav Republic of Macedonia [...] The current system is manifestly not capable of processing the increasing numbers of asylum-seekers in a manner consistent with international and EU norms. These shortcomings, viewed in combination with the fact that there has not been a single recognition of refugee status since April 2008, strongly suggest that the asylum system as a whole is not adequately recognizing those in need of international protection." The UNHCR Report is entitled "*Serbia as a Country of Asylum; Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia*." The Court also considered the fact that a report entitled "Country Report: Serbia", up-to-date as of 31 December 2016, prepared by AIDA, Asylum Information Database, published by ECRE, stated that the "adoption of the new Asylum Act, initially foreseen for 2016, has been postponed".

515 The Court cited here the following excerpts of a report prepared in August 2015 by the UNHCR:

"[...] The former Yugoslav Republic of Macedonia has a national asylum law, the Law on Asylum and Temporary Protection. This was substantially amended in 2012, with the amended version having come into force in 2013. UNHCR participated in the drafting process, in an effort to ensure that the legislation is in line with international standards. The law currently incorporates many key provisions of the 1951 Convention. Furthermore, the provisions on subsidiary protection in the law are in conformity with relevant EU standards. The law also provides for certain rights up to the standard of nationals for those who benefit from international protection, as well as free legal aid during all stages of the asylum procedure. Nevertheless, some key provisions are still not in line with international standards. In response to a sharp increase in irregular migration, the Law on Asylum and Temporary Protection was recently further amended to change the previously restrictive regulations for applying for asylum in the former Yugoslav Republic of Macedonia, which exposed asylum-seekers to a risk of arbitrary detention and push-backs at the border. The new amendments, which were adopted on 18 June 2015, introduce a procedure for registration of the intention to submit an asylum application at the border, protect asylum-seekers from the risk of *refoulement* and allow them to enter and be in the country legally for a short timeframe of 72 hours, before formally registering their asylum application... Despite these positive developments, UNHCR considers that significant weaknesses persist in the asylum system in practice. At the time of writing, the former Yugoslav Republic of Macedonia has not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure. ... Inadequate asylum procedures result in low recognition rates, even for the minority of asylum-seekers who stay in the former Yugoslav Republic of Macedonia to wait for the outcome of their asylum claim." The UNHCR Report is entitled "The Former Yugoslav Republic of Macedonia as a Country of Asylum".

expelled to Greece, notably given the procedural shortcoming and the very low recognition rate in the former Yugoslav Republic of Macedonia. In regard to Greece, the Court previously found that the reception conditions of asylum seekers, including the shortcomings in the asylum procedure, amounted to a violation of Article 3, read alone or in conjunction with Article 13 of the Convention.[516] Although recent developments demonstrated an improvement in the treatment of asylum-seekers in Greece conducive to the gradual resumption of transfers to the country, this had not yet been the case at the material time.

While the Court was concerned about the above shortcomings, it emphasised that its task in the present case was not to determine the existence of a systemic risk of ill-treatment in the mentioned countries, as the procedure applied by the Hungarian authorities was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment. The Hungarian authorities relied on a schematic reference to the Hungarian Government's list of safe third countries, disregarded the country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof on them. Moreover, the Court observed that, owing to a mistake, the first applicant had been interviewed with the assistance of an interpreter in Dari, a language he did not speak, and the asylum authority had provided him with an information leaflet on asylum proceedings that was also in Dari, wherefore his chances of actively participating in the proceedings and explaining the details of his flight from his country of origin had been extremely limited. The Court stressed that although the applicants were illiterate, all the information they had received on the asylum proceedings had been contained in a leaflet. In addition, a translation of the decision in their case was produced to their lawyer only two months after the relevant decision had been taken, at a time when they had been outside Hungary already for two months.

Having regard to the above considerations, the Court concluded that the applicants had not had the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention.

(f) On Other Alleged Violations

In view of its finding that the applicants' expulsion to Serbia constituted a violation of Article 3 of the Convention, the Court did not consider it necessary to give a separate ruling on the admissibility or the merits of the complaint under Article 13 taken together with Article 3 of the Convention.

516 The Court relied here on *M. S. S. v. Belgium and Greece*, paras. 62–86, 231, 299–302 and 321.

CASE OF TARAKHEL V. SWITZERLAND
(Judgment of 4 November 2014)

CASE BRIEF

I FACTS

The applicants, Mr. Tarakhel, his wife and their six minor children, were Afghan nationals, who had lived in Pakistan, Iran and Turkey, from where they arrived to Italy. In Italy, after supplying a false identity, the applicants were subjected to the EURODAC identification procedure and placed in a reception facility. Once their true identity had been established, they were transferred to the Reception Centre for Asylum Seekers ("CARA") in Bari.

The applicants left the CARA in Bari without permission and travelled to Austria, where they were again registered in the EURODAC system. They lodged an application for asylum which was rejected. On 1 August 2011, Austria submitted a request to take charge of the applicants to the Italian authorities, which accepted the request on 17 August 2011. Soon after, the applicants travelled to Switzerland and lodged an asylum application on 3 November 2011. They were interviewed by the Federal Migration Office, which requested of the Italian authorities to take charge of the applicants. The Italian authorities tacitly accepted the request.

On 24 January 2012, the Switzerland authorities decided not to examine the applicants' asylum application on the grounds that, in accordance with the European Union's Dublin Regulation, by which Switzerland was bound (under the terms of an association agreement with the European Union), Italy was the State responsible for examining the application. The Federal Migration Office issued an order for the applicants' removal to Italy. On 2 February 2012, the applicants appealed against the removal to the Federal Administrative Court, which dismissed the appeal.

The applicants requested the Switzerland authorities to have the proceedings reopened and to grant them asylum in Switzerland. The Federal Administrative Court rejected the appeal on the ground that the applicants had not submitted any new arguments.

In a letter of 10 May 2012, the applicants applied to the ECtHR and sought an interim measure requesting the Swiss Government not to deport them to Italy for the duration of the proceedings. The acting President of the Section, to which the case had been assigned, decided to indicate to the Swiss Government (under Rule 39 of the Rules of Court) that the applicants should not be deported to Italy for the duration of the proceedings before the Court.

II LEGAL ISSUES

(1) Whether the applicants would be subjected to inhuman and degrading treatment if they were returned to Italy, in breach of Article 3 of the Convention.

(2) Whether the right to respect for family life, enshrined in Article 8 of the Convention, would be violated if the applicants were to be returned to Italy, given the fact that they had no ties in Italy and did not speak the language.

(3) Whether the Swiss authorities' alleged failure to give sufficient consideration to the applicants' personal circumstances and to take into account their situation as a family in the procedure for their return to Italy amounted to a violation of Article 13 taken in conjunction with Article 3 of the Convention.

III HOLDING

(1) The complaints of a violation of Article 3 of the Convention are admissible and the remainder of the application is inadmissible (unanimously);

(2) There would be a violation of Article 3 of the Convention if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together (by fourteen votes to three);

(3) The Court's finding at point 2 above constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants (unanimously);

(4) The respondent State is to pay the applicants, within three months, EUR 7,000 plus any tax that may be chargeable to the applicants, in respect of costs and expenses (unanimously).

IV REASONING

(a) Reasons why the Court found the application admissible under Article 3 of the Convention and why it declared the rest of the application inadmissible

The Court did not find any reason to declare the application manifestly ill-founded under Article 3 of the Convention.

However, it rejected the complaint under Article 13 taken in conjunction with Article 3 of the Convention as manifestly ill-founded. The Court found that the

applicants had at their disposal an effective remedy in respect of their Article 3 complaint. It noted that the applicants had been interviewed by the Federal Migration Office, in a language they understood, and asked to explain in detail the possible grounds for not returning them to Italy. Following its decision to reject their claim for asylum and return them to Italy, the applicants were able to lodge an application with the Federal Administrative Court. That court ruled promptly on the application and dismissed it seven days after it had been lodged. Following that dismissal, the applicants filed a request with the Federal Migration Office "to have the asylum proceedings reopened". The Court also found that the judgment of the Federal Administrative Court dealt unambiguously with the specific situation of the applicants as a family with young children, addressed in detail the complaints raised by the applicants and was fully reasoned. Furthermore, according to the Court, the fact that the Federal Administrative Court has opposed the return of asylum seekers to "Dublin" States in some cases, including that of a family with young children who were to be deported to Italy, or made it subject to conditions, also suggests that that court normally undertakes a thorough examination of each individual situation.

(b) Reasons why the Court found a violation of Article 3 of the Convention

The Court first emphasised the most important principles applicable in the present case. It reiterated that, according to its well-established case-law, the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 of the Convention implies an obligation not to expel the individual to that country.

In addition, the Court has held on numerous occasions that the ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. The assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

However, the Court has also ruled that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home, nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.

Yet, in the case of *M. S. S. v. Greece*, the Court nevertheless took the view that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers had entered into positive law and that the Greek authorities were bound to comply with their own legislation transposing European Union law, namely the Reception Directive. In that judgment, the Court attached considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive. Tasked with determining whether a situation of extreme material poverty could raise an issue under Article 3 of the Convention, the Court reiterated in the *M. S. S.* case that it had not excluded "the possibility that the responsibility of the State [might] be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity".

With a specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents.

The Court then turned to examine the applicants' allegation that, if they were returned to Italy "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum seekers.

In order to examine the complaint, the Court considered it necessary to follow an approach similar to the one it had adopted in the *M. S. S.* judgment, in which it examined the applicant's individual situation in the light of the overall situation prevailing in Greece at the relevant time. Therefore, it first referred to its well-established case-law, according to which the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3 where "substantial grounds have been shown for believing" that

the person concerned faces a "real risk" of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. The Court emphasised that it was also clear from the *M. S. S.* judgment that the presumption that a State participating in the "Dublin" system would respect the fundamental rights laid down by the Convention was not irrefutable. It cited the Court of Justice of the European Union, which ruled that the presumption that a Dublin State complied with its obligations under Article 4 of the Charter of Fundamental Rights of the European Union was not irrefutable and ruled: "[I] n the case of "Dublin" returns, the presumption that a Contracting State, which was also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country."

According to the Court, the source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.

Therefore, in the present case, the Court had to ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants' specific situation, substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy.

As regarded the overall situation in Italy, the Court noted that the UNHCR Recommendations and the Human Rights Commissioner's report, both published in 2012, referred to a number of failings. It ruled that while the structure and overall situation of the reception arrangements in Italy could not in themselves act as a bar to all removals of asylum seekers to that country, the data and information received nevertheless raised serious doubts as to the current capacities of the system. Accordingly, in the Court's view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded.

As regards the applicants' individual situation, the Court noted that, just as the overall situation of asylum seekers in Italy was not comparable to that of asylum seekers in Greece as analysed in the *M. S. S.* judgment, the specific

situation of the applicants in the present case was different from that of the applicant in the *M. S. S.* case. Whereas the applicants in the present case had immediately been taken charge of by the Italian authorities, the applicant in *M. S. S.* had first been placed in detention and then left to fend for himself, without any means of subsistence.

The Court then reiterated that the ill-treatment had to attain a minimum level of severity to fall within the scope of Article 3 of the Convention, and that asylum seekers, as a "particularly underprivileged and vulnerable" population group, required "special protection" under that provision. In its opinion, this requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents.

The Court observed that, in view of the current situation as regards the reception system in Italy, it was incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy, the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together. The Court also noted that, in their written and oral observations, the Italian Government had not provided specific details on the conditions in which the authorities would take charge of the applicants. According to the Court, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. Consequently, there would be a violation of Article 3 of the Convention if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

III LIST OF ECTHR CASES CITED IN THE CHAPTER

A. A. and Others v. the former Yugoslav Republic of Macedonia, 55798/16, communicated on 23 January 2017

A. and Others v. the United Kingdom, 3455/05 (2009)

Abdolkhani and Karimnia v. Turkey, 30471/08 (2009)

Amuur v. France, 19776/92 (1996)

Berdzenishvili and Others v. Russia, 14594/07 (2016)

Bouyid v. Belgium, 23380/09 (2015)

Chahal v. the United Kingdom, 22414/93 (1996)

Čonka v. Belgium, 51564/99 (2002)

E. v. Norway, 11701/85 (1990)

El-Masri v. the former Yugoslav Republic of Macedonia, 39630/09 (2012)

Fuchser v. Switzerland, 55894/00 (2006)

Gül v. Switzerland, 23218/94 (1996)

Georgia v. Russia, 13255/07 (2014)

Hirsi Jamaa and Others v. Italy, 27765/09 (2012)

Ilias and Ahmed v. Hungary, 47287/15 (2017)

Kalashnikov v. Russia, 47095/99 (2002)

Khlaifia and Others v. Italy, 16483/12 (2016)

L. M. v. Slovenia, 32863/05 (2014)

M. A. v. Cyprus, 41872/10 (2013)

Medvedyev and Others v. France, 3394/03 (2010)

M. S. S. v. Belgium and Greece, 30696/09 (2011)

Riad and Idiab v. Belgium, 29787/03 and 29810/03 (2008)

Saadi v. the United Kingdom, 13229/03 (2008)

Selmouni v. France, 25803/94 (2007)

Sharifi and Others v. Italy and Greece, 16643/09 (2014)

Shioshvili and Others v. Russia, 19356/07 (2016)

Stanev v. Bulgaria, 36760/06 (2012)

Sultani v. France, 45223/05 (2007)

Tarakhel v. Switzerland, 29217/12 (2014)

Chapter 8: NOTE ON THE REASONING OF JUDGMENTS IN THE LIGHT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. Each and every Member State of the Convention has its own tradition in respect of the administration of justice. Drafting court judgments is part of that tradition and therefore subject to certain practices, modes and patterns that cannot easily be altered and should not change just for the sake of adopting something different, which may or may not be better than the existing standards in a state.

The following paragraphs are therefore aimed at highlighting certain elements of judicial technique, which can be distilled from the ECtHR's case-law as useful topics for comparing national practices and discussions within the framework of the dialogue of jurisdictions. Comparison of the national and international standards and modes of proceeding with the laborious task of drafting judgments may turn out to be the way to improve some of the techniques or patterns arising thereof. The author of this Chapter is a Serbian lawyer, wherefore his point of reference will inevitably be the practice of the courts of law in his country. That practice may to some extent be similar, albeit not necessarily identical, to those in other ex-Yugoslav republics or other European countries.

2. One of the features of judgments delivered at the national level of jurisdiction that seems to be somewhat different when compared with the judgments given by the Court is the structure of the text. In a judgment of a Serbian court of law, there is a Verdict (V) followed by a Reasoning (R), as it is called in the judgments. At this stage, the author deliberately leaves out some other important elements of judgments, which exist both at the national and international levels, such as, for instance, the designation of the parties to the proceedings, or the dates of deliberations and delivery of judgments,

etc. Notably, no part of a judgment at the national level, at least not as far as headings in its text are concerned, is dedicated to the Facts of the case (F).

The simple (V) + (R) formula that we see at the national level is somewhat more complex in the judgments of the Court. Firstly, there are more headings; secondly, they do not follow the same order. At the national level, the Verdict (V) comes first and is followed by what is called a Reasoning (R). In the Court's judgments, the Operative Part, which corresponds to the Verdict, comes last. The whole structure and, respectively, the formula of the Court's judgments are different: first come the Facts (F), then the Law (L), followed by the Court's Assessment (CA). At the end comes the Operative Part (OP), *i.e.* the Verdict. Therefore, the formula is: (F) + (L) + (CA) + (OP). It appears that the element (R) of the domestic judgment formula is missing. This is, however, due to the fact that the element (R) in the judgments of national courts at the European level corresponds to the elements (L) and (CA) of the Court's judgments. The equation is (R) = (L) + (CA). Since there is no heading dedicated to the Facts in the national courts' judgments, the equation may even be considered to be richer than the one just mentioned and expressed as the following formula (R) = (F) + (L) + (CA).

Now, if we leave the formula aside and turn to the substance, it is easy to realise that the quoted relevant Law and the Reasoning, together with the Facts, are interlaced or merged at the national level, whereas they are being clearly separated and independently presented in the Court's judgments. This can be ascribed to tradition and cannot be easily altered, but it is nevertheless worth noting that including excerpts of the relevant Law along with a proper Reasoning under the one and the same heading, and interspersing them with the Facts of the case, does not serve much of a purpose. To say the least, it may create confusion in the sense that the proper Reasoning is not clearly identifiable.

3. Judgments rendered at the national level of jurisdiction do, indeed, reproduce in their texts the arguments put forward by the parties. However, there are judgments in which such arguments are not sufficiently reproduced. Such judgments are exceptions, of course, but it may be asserted that the reproduction of the parties' submissions and arguments is generally given more room in the Court's judgments than in those of the national courts of law. This is worth noting because it is closely related to another important feature worth comparing at the two levels of jurisdiction, the national and the international: the manner in which the parties' submissions are laid out in the judgments.

4. The Court's judgments always include the Court's attitude towards the lines of arguments pursued by the parties to the proceedings. This seems

to be almost essential for the Court's task. Its stance in respect of the arguments invoked by one party or the other becomes clear in the light of this particular element that we find in its judgments. It is incumbent on any court to provide a Reasoning, *i.e.* a justification for its Verdict, no matter whether the latter comes at the beginning or at the end of the judgment. It is the Reasoning that counts and it is above all the Reasoning that can provide proper authority to a Verdict. In other words, the authority of a court decision, both at the national and international levels, lies with the Reasoning, and the Reasoning alone. That is what makes the importance of distilling the Reasoning in the proper sense of the word, *i.e.* explicating the grounds for a certain Verdict, and separating them from the other elements that we find in the text of a judgment, such as, *e.g.* the Facts or the relevant Law.

To return to the formula once again, (R) should never encompass (F), (L) and (CA) taken together. This means that (F), (L) and (CA) must each stand by themselves. They should never melt into a less comprehensible (R). In other words, Facts, Law and the Court's Assessment should be presented separately in a judgment, because a proper Reasoning is to be found only in the latter. The Reasoning in the true sense of the term thus acquires the central role it should have in a judgment. The Reasoning, however, embraces two different aspects. One concerns the facts and the other the law.

5. Although it may seem awkward to some, it needs to be underlined that the courts of law inevitably perform reasoning on the facts. The reasoning on the facts of a case is as important as reasoning on the law. Let us therefore depart from the words of Argentinian judge and law professor, Agustin Gordillo, who says in his *Introduction to Law* that "the justice of the solution of the specific case comes from the true explanation of the facts and the law involved in them."[517] A judgment of any court of law must rely on evidence presented to the judge. It must be absolutely clear from the text of the judgment how the judge learned and interpreted the facts that constituted evidence. Therefore, it is clear that there is a reasoning on evidence. It is in connection with evidence and with the support of evidence that a judge's power of adjudication becomes legitimate. Unless rooted in evidence, the judge's power of adjudication might become arbitrary. Muriel Fabre-Magnan is right to underline that a just reasoning is needed to demonstrate that the judge has not overstepped his or her own powers of interpretation.[518] Returning once again to Gordillo, one must agree with him

517 Agustin Gordillo, *An Introduction to Law,* London, European Public Law Center & Esperia Publications Ltd., 2003, p. 48. For the purpose of this text, it is important to note that at this point the author refers to Gustavino's treatise on administrative judiciary and Tawil's book on judicial review of administrative action (both in Spanish).

518 Murilo Fabre-Magnan, *Introduction au droit,* Paris, PUF, 2016, p. 81.

that, "[I]t is in inquiring about facts that the most important test of every legal case lies."[519]

6. As far as the reasoning on the law is concerned, two major issues spring to mind. The first regards the fact that the reasoning on the law should be presented separately in a judgment, because of its importance, and the second regards the technique of the reasoning on the law. The first element is clear enough and does not call for further elaboration. The more distinctly the reasoning on the law is presented, the more comprehensible the judgment.

The second issue appears more complicated. The main question is what we mean by "law" when we treat the issue of the "reasoning on the law". "Law" is usually perceived as a corpus of legal provisions, which are to be found mostly in statutes, but also in jurisprudence. Such an idea of "law" does not fully correspond to reality and has been abandoned by most prominent scholars. Ronald Dworkin described the concept of law as consisting only of a corpus of rules by words, which may sound crude, but is nevertheless true. He wrote that such an idea of law corresponded to "a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges".[520] In their everyday work, judges cannot explore such a warehouse.

When a judge applies a legal rule, stemming either from written or unwritten law, he or she is in pursuit of justice and the best way of attaining it. Therefore, the judge's task does not end in posing a logical syllogism in which a rule is used as a premise. Quite the contrary, the task of a judgment is primarily to attain justice. Legal rules serve the purpose of enabling the judges to perform that noble task. A judge cannot create a rule, but in rendering a judgment, he brings justice to the parties and settles a dispute. Handling of a legal rule will therefore serve as a lever to restore social peace in a fair way. Subsequently, when a judge applies a rule, he or she ventures on a creative activity.

The old idea of the judge as a mechanic must be rejected. Judges apply the law in a creative way; they are not in the position to create law or give law, but by giving their rulings, judges apply the legal rules to the Facts of a case. That is why firstly it is important to clearly separate the judge's Reasoning from the other parts of the text in a judgment. Secondly, that is how a link is created between the two aspects of the Reasoning: the reasoning on the facts and the reasoning on the law.

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519 Gordillo, *op. cit.*, p. 50. Gordillo makes references to other authors, such as Binder and Bergman, Levi and Lord Denning.

520 Ronald Dworkin, *Taking Rights Seriously,* London, Duckworth, 1987, p. 15.

Of course, one of the parties will inevitably be dissatisfied with the outcome of the case, but the real issue lies in the attitude that the community at large forms towards the judges' activity in the long run. Should that activity turn out to be irrational, the community of human beings would cease to exist. It is the cohesion of the society that is at stake, and it primordially relies on the judges' creativity in applying the law.[521] Judges manage to create social cohesion by issuing rational judgments, based on proper Reasoning, both on the facts and the law.

7. The following question will inevitably arise at this stage: where do we stand? What can a practical mind suggest to the judges? What US President Wilson said of lawyers almost one hundred years ago fully applies to judges as well: "Lawyers dread experiments." Judges are not likely to alter the practices they are used to following in their national legal systems and suggesting changes would amount to naivety. It is highly likely that the formula mentioned at the beginning of this text will be maintained, unless something highly unusual happens, of course. Introduction of new headings, or, in the least, of subheadings in the texts of the judgment, which would separate the respective parts of the judgments, is not to be expected.

However, some improvements can be made even if the simple (V) + (R) formula is preserved. One step in the desired direction might involve numbering the paragraphs in (R), thus clearly delineating the parts of the judgment text dedicated to the Facts, Law and Proper Reasoning and the Judge's Assessment, even without introducing any headings or subheadings. Generally speaking, diversification of (R) paves the way to better judgments. Some improvements may ultimately be made even without introducing such a tiny alteration as numbering the judgment paragraphs, owing to the judges' awareness of the presence of the elements discussed in this brief Chapter in their judgments at the national level of jurisdiction.

521 More on the subject of the judges' creativity in respect of the operation of law in Dragoljub Popović, *The Emergence of the European Human Rights Law,* The Hague, Eleven International Publishing, 2011, pp. 34–38.

Appendix:

EUROPEAN CONVENTION ON HUMAN RIGHTS

as amended by Protocols
Nos. 11 and 14
supplemented by Protocols
Nos. 1, 4, 6, 7, 12 and 13

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 201 0. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 1 1 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

Only the English and French versions of the Convention are authentic.

European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
www.echr.coe.int

CONTENTS

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI. 1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10lh December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1
Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penally is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penally be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

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

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 safely or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

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

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

ARTICLE 10

Freedom of expression

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

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

ARTICLE 11

Freedom of assembly and association

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

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

ARTICLE 12

Right to marry

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

ARTICLE 13

Right to an effective remedy

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

ARTICLE 14

Prohibition of discrimination

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

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Parly may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the

situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Parly availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Restrictions on political activity of aliens

Nothing in Articles 10, 1 1 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II

EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall

be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

ARTICLE 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Parly by a majority of votes cast from a list of three candidates nominated by the High Contracting Parly.

ARTICLE 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.

2. The terms of office of judges shall expire when they reach the age of 70.

3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

ARTICLE 24

Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.

2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

ARTICLE 25

Plenary Court

The plenary Court shall

(a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;

(b) set up Chambers, constituted for a fixed period of time;

(c) elect the Presidents of the Chambers of the Court; they may be re-elected;

(d) adopt the rules of the Court;

(e) elect the Registrar and one or more Deputy Registrars;

(f) make any request under Article 26, paragraph 2.

ARTICLE 26

Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Parly in respect of which that judge has been elected.

4. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Parly concerned. If there is none or if that judge is unable to sit, a person chosen

by the President of the Court from a list submitted in advance by that Parly shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Parly concerned.

ARTICLE 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2. The decision shall be final.

3. If the single judge does notdeclare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

ARTICLE 28

Competence of Committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Parly concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Parly has contested the application of the procedure under paragraph 1 .(b).

ARTICLE 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

ARTICLE 30

Relinquishment of jurisdiction to the Grand Chamber

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.

ARTICLE 31

Powers of the Grand Chamber

The Grand Chamber shall

(a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;

(b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and

(c) consider requests for advisory opinions submitted under Article 47.

ARTICLE 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33

Inter-State cases

Any High Contracting Parly may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Parly.

ARTICLE 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36

Third parly intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Parly one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Parly which is not a parly to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

ARTICLE 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

ARTICLE 38

Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

ARTICLE 39

Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the

matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

ARTICLE 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

ARTICLE 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Parly concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured parly.

ARTICLE 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any parly to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application

of the Convention or the Protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44

Final judgments

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final

(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

ARTICLE 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 46

Binding force and execution of judgments

1.The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.

4. If the Committee of Ministers considers that a High Contracting Parly refuses to abide by a final judgment in a case to which it is a parly, it may, after serving formal notice on that Parly and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Parly has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ARTICLE 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or 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.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

ARTICLE 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

ARTICLE 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

ARTICLE 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III

MISCELLANEOUS PROVISIONS

ARTICLE 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

ARTICLE 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Parly or under any other agreement to which it is a parly.

ARTICLE 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force

between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

ARTICLE 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 58

Denunciation

1. A High Contracting Parly may denounce the present Convention only after the expiry of five years from the date on which it became a parly to it and after six months' notice contained in a notification addressed to the

Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Parly concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Parly which shall cease to be a member of the Council of Europe shall cease to be a Parly to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article56.

ARTICLE 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4TH DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.111.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1 950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1
Protection of property

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

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

ARTICLE 2
Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State

shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

Right to free elections

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

ARTICLE 4

Territorial application

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

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

A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

ARTICLE 5

Relationship to the Convention

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

ARTICLE 6

Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any

signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

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

DONE AT PARIS ON THE 20TH DAY OF MARCH 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

Protocol No. 4

to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto

Strasbourg, 16.IX.1963

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1 950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

ARTICLE 1

Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

ARTICLE 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safely, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

ARTICLE 3

Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

ARTICLE 4

Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

ARTICLE 5

Territorial application

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

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

3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

ARTICLE 6

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 7

Signature and ratification

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

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

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, This 16th Day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

Protocol No. 6

to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Strasbourg, 28.IV. 1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penally;

Have agreed as follows:

ARTICLE 1

Abolition of the death penalty

The death penally shall be abolished. No one shall be condemned to such penally or executed.

ARTICLE 2

Death penalty in time of war

A State may make provision in its law for the death penally in respect of acts committed in time of war or of imminent threat of war; such penally shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

ARTICLE 3

Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 1 5 of the Convention.

ARTICLE 4

Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 5

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

ARTICLE 6

Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

ARTICLE 7

Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification,

acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 8

Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of

Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 9

Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 28TH DAY OF APRIL 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 7

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1

Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph l.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

ARTICLE 2

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The

exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

ARTICLE 3

Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

ARTICLE 4

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 1 5 of the Convention.

ARTICLE 5

Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to

marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

ARTICLE 6
Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and State the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non¬governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

ARTICLE 7

Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the

Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 8

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 9

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 10

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;

(d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, This 22nd Day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 12

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

The Member States of the Council of Europe, signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of nondiscrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

ARTICLE 1
General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, properly, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

ARTICLE 2
Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

ARTICLE 3
Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 4
Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification,

acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 5

Entry into force

1. 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 ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 6

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 2 and 5;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT ROME, THIS 4TH DAY OF NOVEMBER 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

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

Vilnius, 3.V.2002

The Member States of the Council of Europe, signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1 950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

ARTICLE 1
Abolition of the death penalty

The death penally shall be abolished. No one shall be condemned to such penally or executed.

ARTICLE 2
Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 1 5 of the Convention.

ARTICLE 3
Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 4
Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

ARTICLE 5
Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 6

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 7

Entry into force

1. 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 ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 8

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, This 3rd Day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

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ReSPA is an international organisation which has been entrusted with the mission of boosting regional cooperation in the field of public administration in the Western Balkans. As such, ReSPA is a unique historical endeavour, established to support the creation of accountable, effective and professional public administration systems for the Western Balkans on their way to EU accession.

ReSPA seeks to achieve this mission through the organisation and delivery of training activities, high level conferences, networking events and publications, the overall objectives of which are to transfer new knowledge and skills as well as to facilitate the exchange of experiences both within the region and between the region and the EU Member States.

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