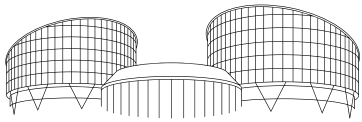

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law 2018

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Case-law overview

This overview contains a selection by the Jurisconsult of the most interesting cases from 2018.

In 2018[1], the cases of particular legal interest dealt, among other subjects, with issues relating to civil and criminal justice, and in particular to disciplinary matters concerning judges, to the scope of private and family life, the home and the right to respect for reputation, to the media and the Internet, to Articles 15 and 18 of the Convention, to the protection of minorities, to advertising and commercial activity, and to the application of Convention law in the area of sport.

The Grand Chamber delivered fourteen judgments and one decision in 2018. In the case of *S., V. and A. v. Denmark* it set down the conditions in which States may have recourse to preventive detention in order to counter the threat of violence by spectators at sporting events (Article 5). It elaborated on its case-law concerning the detention of persons of unsound mind from the standpoint of Article 5 § 1 (e) and Article 7 § 1 (*Ilnseher*).

The Grand Chamber also addressed the compatibility with Article 6 § 1 of disciplinary proceedings against judges (*Denisov* and *Ramos Nunes de Carvalho e Sá*). In the *Naït-Liman* judgment, concerning the victims of acts of torture, the Grand Chamber ruled on whether the national courts are required to examine compensation claims in cases where the alleged acts of torture were committed outside the national territory by, or under the jurisdiction of, a third State (Article 6). The Grand Chamber also defined the criteria to be taken into account in deciding whether restrictions on access to the superior courts are compatible with Article 6 § 1 (*Zubac*).

In *G.I.E.M. S.r.l. and Others* the Grand Chamber examined whether a confiscation of property in the absence of a criminal conviction was compatible with the right to be presumed innocent (Article 6 § 2),

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court.

and the principle that offences and penalties must be provided for by law (Article 7). It further clarified the content of the right of suspects to have access to a lawyer at the pre-trial stage, the privilege against self-incrimination and the right to remain silent (*Beuze*). In *Correia de Matos* the Grand Chamber elucidated its case-law on the requirement for an accused person to be assisted by a lawyer and the scope of the right to conduct one's own defence (Article 6 § 3 (c)). The *Murtazaliyeva* judgment clarified the jurisprudential principles applicable to the calling and examining of defence witnesses for the purposes of Article 6 § 3 (d) of the Convention.

The *Denisov* judgment, which concerned "professional and social reputation", set out the principles for establishing whether a professional dispute falls within the ambit of "private life" within the meaning of Article 8.

In its judgment in *Navalnyy* the Grand Chamber examined whether the arrest on several occasions of an opposition political activist who was detained and penalised for taking part in public gatherings was compatible with Articles 5 and 6 and with the right to freedom of assembly (Article 11). For the first time, the Court found a violation of Article 18 taken in conjunction with Article 11 (ibid.), and found that an applicant could rely on Article 18 read in conjunction with Article 5 § 3 (*Selahattin Demirtaş (no. 2)*).

Also for the first time, the Court examined a case concerning the application of Islamic religious law (Sharia law) to an inheritance dispute against the wishes of the beneficiary of the will (*Molla Sali*, Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1).

With regard to the right to the peaceful enjoyment of possessions, the judgment in *G.I.E.M. S.r.l. and Others* spelled out the need to afford procedural safeguards to the owners of confiscated property. In *Lekić* the Grand Chamber explored the implications of a law on companies for the financial liability of company directors.

Finally, in *Radomilja and Others* the Grand Chamber examined the scope of Articles 32 and 34 of the Convention, and in particular the definition of the notion of "complaint" and thus of the scope of the case before the Court.

Other important cases concerned the extent of States' obligations regarding criminal investigations into murder (*Akelienė*), including the murder of an investigative journalist (*Mazepa and Others*), the pre-trial detention of journalists (*Mehmet Hasan Altan* and *Şahin Alpay*) and the pre-trial detention of a member of parliament (*Selahattin Demirtaş (no. 2)*).

With regard to Article 6, in addition to examining the applicability of that Article to a call for tenders for the award of funding (*Mirovni Inštitut*), the Court revisited its case-law on the use of arbitration to resolve disputes in professional sport (*Mutu and Pechstein*). It also ruled on the need for foreign defendants to be provided with interpreting in order to conduct their defence (*Vizgirda*).

Other cases of legal interest concerned the scope of "private" life in connection with the disclosure by the authorities of information required for the protection of national security (*Anchev*), with the opening by an employer of personal files stored by an employee on his work computer (*Libert*), and with doping controls in sport (*National Federation of Sportspersons' Associations and Unions (FNASS) and Others*). Also under Article 8, the Court considered the protection to be afforded during a criminal investigation to the relatives of the deceased (*Solska and Rybicka* and *Lozovyye*) and the authorities' obligations towards a minor whose parents were detained by the police (*Hadzhieva*).

For the first time, the Court explored the balance to be struck between the right to the protection of personal data (Article 8) and the online archiving of information by the media (Article 10) (*M.L. and W.W. v. Germany*), and ruled on the use by the media of hyperlinks to defamatory content (*Magyar Jeti Zrt*). It also examined the large-scale interception of communications and intelligence sharing with foreign States, particularly in the context of terrorism (*Big Brother Watch and Others*), and the reconciling of religious sensitivities and freedom of expression in the sphere of advertising (*Sekmadienis Ltd.*).

Other cases of jurisprudential interest concerned dangerous activities (*Kurşun*), the regulation of commercial activity (*O'Sullivan McCarthy Mussel Development Ltd* and *Könyv-Tár Kft and Others*) and the regulation of the private rental sector (*F.J.M. v. the United Kingdom*).

In its judgments in *Mehmet Hasan Altan* and *Şahin Alpay* the Court considered the validity of a derogation during a state of emergency (Article 15) and, in *Ireland v. the United Kingdom*, ruled for the first time on a request for revision of a judgment in an inter-State case (Rule 80 of the Rules of Court).

The Court's case-law also had regard to the interaction between the Convention and European Union law. For the first time the Court ruled on the extent of the obligation for courts whose decisions are not open to appeal to give reasons for refusing to seek a preliminary ruling from the Court of Justice of the European Union (CJEU) (*Baydar*). The Court also examined a case concerning a CJEU judgment in the context of infringement proceedings (*O'Sullivan McCarthy Mussel Development Ltd*).

It referred to the Charter of Fundamental Rights (*Correia de Matos*), to EU directives in criminal matters (*Correia de Matos* and *Vizgirda*) and to the case-law of the CJEU (*Big Brother Watch and Others* and *Lekić*).

In several cases the Court took into account the interaction between the Convention and international law (*Naït-Liman*, *Mutu and Pechstein*, *Correia de Matos, National Federation of Sportspersons' Associations and Unions (FNASS) and Others*, *Molla Sali* and *Lekić*). It found support in the rulings of the International Court of Justice (*Lekić*), the Council of Europe Framework Convention for the Protection of National Minorities (*Molla Sali*) and the Council of Europe's Anti-Doping Convention (*National Federation of Sportspersons' Associations and Unions (FNASS) and Others*).

It addressed States' positive obligations under the Convention (*Hadzhieva*) and their procedural obligations (*S., V. and A. v. Denmark, Akelienė* and *Vizgirda*). A number of important judgments elucidated the margin of appreciation to be granted to the Contracting Parties to the Convention (*Naït-Liman*, *Zubac* and *Correia de Matos*, among others) and the role of the principle of subsidiarity (*Radomilja and Others*).

JURISDICTION AND ADMISSIBILITY

Admissibility (Articles 34 and 35)

Radomilja and Others v. Croatia[2] concerned Articles 32 and 34 of the Convention and in particular the elements that define a complaint and thus the scope of a case referred to the Court.

The case concerns two applications relating to disputes between the applicants and the local authorities over several plots of land that were "socially owned" during the socialist era. Under domestic law it was not possible to acquire socially owned land by adverse possession during socialism (1941-91), although it could have been so acquired before that period. That rule was temporarily derogated from (in 1997) until the Constitutional Court invalidated that derogation (in 1999), thereby restoring the exclusion of the period 1941-91 from the qualifying period for adverse possession. The applicants claimed to have acquired socially owned land by adverse possession. Final domestic decisions rejected their claims, on the basis that they had not possessed the land for the requisite period before 1941. Their constitutional appeals were rejected, although they did not invoke their right to property.

Before the Court they complained under Article 1 of Protocol No. 1 of the domestic courts' refusal to acknowledge their acquisition by adverse possession, arguing mainly that those courts had wrongly assessed the facts and misapplied domestic law. The Chamber concluded, on the

2. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.

basis of *Trgo v. Croatia*[3], that the applicants had acquired the land *ex lege* while the derogation had been in force and found a violation of Article 1 of Protocol No. 1, thus taking into account the period 1941-91 in the qualifying period for adverse possession. On 28 November 2016 a panel referred the case to the Grand Chamber. The Grand Chamber found that, in so far as the complaints before it included the period 1941-91, they were new because the applicants had not relied on that period before the Chamber. Consequently, those complaints were inadmissible as out of time (the remaining complaints were found not to give rise to a violation of the Convention).

The case is interesting in that the Chamber had based its judgment on a factual (the period 1941-91) and legal basis not invoked by the applicants either before the domestic courts or before the Chamber. The Grand Chamber was required therefore to answer the rather fundamental question of what defines a complaint and thus the scope of a case before the Court and, notably, whether it is the factual allegations, alone or in conjunction with the legal submissions, that define the complaint.

The Grand Chamber found that the scope of the case referred to the Court in the exercise of the right of individual application was determined by the applicant's complaint, reflecting thereby the principle of *ne eat judex ultra et extra petita partium* (not beyond the request). A complaint consists of two elements: factual allegations and legal arguments. By virtue of the principle of *jura novit curia* (the court knows the law), the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under different Articles or provisions of the Convention to those relied upon by the applicant. However, it cannot base its decision on facts not covered by the complaint: to do so would amount to ruling beyond the scope of the case and to deciding on matters not "referred to" it, within the meaning of Article 32. Finally, an applicant (or, indeed, the Court *ex officio*) can later clarify or elaborate on the facts initially submitted.

In arriving at this conclusion, the Grand Chamber accepted that different strands of the Court's case-law, while indicating an intrinsic link between the factual and legal submissions, suggested that a complaint is delimited by the facts presented by the applicants. It considered the case-law on exhaustion of domestic remedies to be an exception to that principle, since the Court continues to emphasise the Convention arguments relied on at the national level, finding that a failure to raise legal arguments to the same or like effect based on domestic law leads the Court to conclude that the complaint brought before the authorities had not corresponded in substance to that introduced before the Court

3. *Trgo v. Croatia*, no. 35298/04, 11 June 2009.

and that the applicants had not exhausted domestic remedies. The Grand Chamber thereby emphasised its continued attachment to the principles which afford the State a genuine opportunity of preventing or redressing the alleged violation coherently with the subsidiary character of the Convention system.

In applying these principles to the present case, the Grand Chamber confirmed that the Chamber judgment had been decided on the basis of facts not relied upon by the applicants (the period 1941-91). That judgment was therefore decided beyond the scope of the case as delimited by the applicants' complaints under Article 1 of Protocol No. 1 and, in particular, by the facts alleged therein. That the applicants now wished to rely on this fifty-year period amounted to raising new and distinct complaints before the Grand Chamber. Applying the admissibility criteria to those new complaints, the Grand Chamber found them to have been introduced outside of the six-month time-limit, and therefore concluded that they were inadmissible.

"CORE" RIGHTS

Effective investigation

In the *Mazepa and Others v. Russia*[4] judgment, the Court examined the scope of an investigation into the contract killing of a prominent journalist.

The case concerns the alleged contract killing of a prominent investigative journalist in 2006. Following nine years of investigation and court proceedings, five individuals were eventually convicted of her murder. Those who commissioned the killing have not yet been identified. The applicants, family members of the victim, alleged that the authorities had breached their procedural obligation under Article 2 of the Convention by failing to carry out an effective investigation.

The Court found a breach of the procedural limb of Article 2.

In its view, the investigation was inadequate notwithstanding that it had led to the identification and conviction of five individuals directly responsible for the murder. There was a broader issue which has not yet been properly addressed, namely the identification of the person or persons who commissioned the assassination. Two points may be highlighted.

Firstly, it is noteworthy that the Court placed emphasis on the status of the victim – an investigative journalist. It observed in this connection (paragraph 73) as follows.

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4. *Mazepa and Others v. Russia*, no. 15086/07, 17 July 2018.

> "[I]n cases where the victim of a killing is a journalist, it is of utmost importance to check a possible connection of the crime to the journalist's professional activity. In this connection, the Court would also refer to Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors, in which the Committee of Ministers recommended in paragraph 19 that the conclusions of an investigation must be based on a thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate."

This is also an interesting illustration of the Court's willingness to have recourse to "soft law" as an aid to its interpretation of the Convention's provisions.

Secondly, it stressed (paragraph 75)

> "... that the investigation into a contract killing [of a public figure] cannot be considered adequate to the extent of discharging the obligation of means implicit in the procedural limb of Article 2 in the absence of genuine and serious investigative efforts taken with the view to identifying the intellectual author of the crime, that is, the person or people who commissioned the assassination. The domestic authorities' scrutiny in the case concerning a contract killing must aim to go beyond identification of a hitman and it is incumbent on the Court to satisfy itself that the investigation in the present case has addressed this important point (see, for example, *Gongadze v. Ukraine*, no. 34056/02, § 176, ECHR 2005-XI, and *Huseynova v. Azerbaijan*, no. 10653/10, §§ 115-16, 13 April 2017)."

With these considerations in mind, the Court highlighted the following shortcomings. Although the authorities appeared to have pursued one possible line of inquiry, the respondent State did not provide the Court with any meaningful information about the nature of the measures taken or the follow-up given to the requests they had made to a third State for assistance in the matter. Nor was any explanation given as to why the investigation was focused for a considerable number of years on this single line of inquiry. The Court observed in this connection that the applicants had alleged that public officials may have been implicated in the killing, having regard to the victim's media work during the Chechen conflict. For the Court, in order to comply with Article 2 procedural requirements the domestic authorities should have explored these allegations, even if they eventually proved to be unfounded.

Furthermore, the Court found that the respondent State had failed to provide highly plausible and convincing reasons capable of justifying the length of the proceedings, thus entailing a breach of the promptness and reasonable-expedition requirement of the Article 2 procedural obligation (see, in this connection, *Cerf v. Turkey*[5]).

Akelienė v. Lithuania[6] concerned the authorities' failure to enforce the custodial sentence imposed on an individual convicted of murdering the applicant's son.

The applicant's son and another person disappeared in April 1994. A.G., a suspect in the early days of the investigation, was arrested on 17 March 2006 and charged with their murder. He was placed in pre-trial detention. On 22 November 2006 the Court of Appeal ordered that he be released. Referring to the requirements of Article 5 of the Convention, the Court of Appeal observed, among other things: the case against A.G. was weak; there were no grounds for fearing that he would go into hiding; he had no previous convictions; and the main investigative acts had been completed. In view of the Court of Appeal's finding that alternative means for ensuring A.G.'s appearance at trial should be considered, his identity card and passport were subsequently confiscated. He was also ordered not to leave his place of residence and to report to the police every other day.

On 2 February 2009 the trial court acquitted A.G. and the above-mentioned pre-trial restrictions were lifted. The judgment acquitting A.G. was upheld on appeal, but was later quashed by the Supreme Court on 5 July 2011. Following a fresh hearing before the Court of Appeal, A.G. was found guilty on 27 November 2012 and sentenced to fourteen years' imprisonment. The judgment was sent for execution on 6 December 2012. The authorities learned on 11 December 2012 that A.G. had fled. A national and international search was launched, and on 26 February 2013 the authorities issued a European Arrest Warrant. According to the information provided by the Government, A.G. was granted refugee status in Russia.

In the Convention proceedings the applicant complained in particular of the failure to enforce the custodial sentence imposed on A.G. and drew attention in this connection to the fact that no remand measures were imposed on A.G. during the examination of the case by the Supreme Court and the Court of Appeal. She relied on Article 2 of the Convention. The Court found that there had been no breach of that Article.

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5. *Cerf v. Turkey*, no. 12938/07, §§ 80-81, 3 May 2016.
6. *Akelienė v. Lithuania*, no. 54917/13, 16 October 2018.

The judgment is interesting in that the Court's reasoning is focused on a particular aspect of the State's procedural obligation under Article 2 of the Convention, namely the execution of the final judgment convicting an individual found guilty of the unlawful taking of the life of another. It stressed in this connection (paragraph 85) that

> "... the requirement of effectiveness of a criminal investigation under Article 2 of the Convention can be also interpreted as imposing a duty on States to execute their final judgments without undue delay. It is so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this Article (see *Kitanovska Stanojkovic and Others*, cited above, § 32, and, most recently, *Minneker and Engrand v. Belgium* (dec.), no. 45870/12, § 26, 7 February 2017)."

Turning to the applicant's contention that A.G. should have been detained after the Supreme Court had quashed the acquittal judgment so as to avoid the risk of his absconding, the Court noted that A.G. had been present at all of the various proceedings in his case including the fresh hearing on the merits before the Court of Appeal. On that account the Court was "not prepared to hold that, until 27 November 2012, the authorities did not display the requisite diligence in guaranteeing A.G.'s participation in the criminal proceedings" (paragraph 90 *in fine*).

As regards the period following the pronouncement of the final conviction judgment, the Court had regard to the measures deployed by the authorities to establish A.G.'s whereabouts and to have him extradited. It assessed the diligence shown, having regard to the circumstance as a whole and the nature of the efforts made. It concluded (paragraph 93):

> "... taking into account the information available, the Court does not consider that the measures taken by the State with the aim of finding A.G. after his conviction and having him extradited to Lithuania were insufficient as regards its responsibility to enforce criminal law against those who have unlawfully taken the life of another (see, *mutatis mutandis*, *Ghimp and Others v. the Republic of Moldova*, no. 32520/09, § 43, 30 October 2012, and *Banel v. Lithuania*, no. 14326/11, § 70, 18 June 2013)."

Interestingly, the Court did not take issue with the delay in sending the judgment for execution. While observing that such delay may be problematic in itself, it was not ready to find in this case a violation of Article 2 of the Convention on that fact alone, given that it was not clear whether A.G. had already left Lithuania before his conviction, thus

rendering ineffective any prompt action aimed at the execution of his sentence.

The case is also of interest in that it illustrates the tension which may arise between the requirements of Article 5 § 3 of the Convention – and in particular the application of the principle that the presumption is in favour of liberty – and the Article 2 procedural obligation to ensure that those found responsible by the courts for unlawful killings are punished.

Right to liberty and security (Article 5)[7]

Reasonable suspicion (Article 5 § 1 (c))
Length of pre-trial detention (Article 5 § 3)

In *Selahattin Demirtaş v. Turkey (no. 2)*[8] the Court examined the pre-trial detention of a member of parliament following his lawful arrest and detention.

The applicant was an elected member of the National Assembly and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. The applicant was one of 154 parliamentarians affected by the constitutional amendment. On 4 November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and inciting others to commit a criminal offence. The applicant is still in detention awaiting trial. His parliamentary mandate expired on 24 June 2018.

The Court found that there had been a lawful basis for depriving the applicant of his liberty, namely Articles 100 et seq. of the Criminal Code as made applicable to him by virtue of the (constitutionally mandated) lifting of his parliamentary immunity. Following a comprehensive review of its case-law on the notion of "reasonable suspicion" within the meaning of Article 5 § 1 (c), it concluded that there were grounds which would have persuaded an objective observer that the applicant had committed a criminal offence. The Court's finding is of relevance for its later treatment of the applicant's Article 18 complaint.

The Court held that the applicant's detention was incompatible with Article 5 § 3 requirements. Importantly, it stressed in line with

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7. See also, under Article 11 (Freedom of peaceful assembly) and Article 18 (Restrictions not prescribed by the Convention) below, *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018.

8. *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018 (not final). See also under Article 3 of Protocol No. 1 (Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

its established case-law (see, in particular, *Buzadji v. the Republic of Moldova*[9]) that the existence of "reasonable suspicion" justified the applicant's initial detention and, importantly, continued throughout the period of his detention, this being a condition *sine qua non* for the validity of continued detention. However, the persistence of the "reasonable suspicion" requirement did not suffice to justify the prolongation of the applicant's detention, and the reasons relied on (the risk that the applicant would flee or tamper with evidence, the gravity of the charges, etc.) were in effect stereotypical and abstract responses to his requests for release, with no real consideration given to alternative ways to secure his appearance at trial. In the Court's view "decisions worded in formulaic terms as in the present case can on no account be regarded as sufficient to justify a person's initial and continued pre-trial detention". It is noteworthy that the Court reverted to this reasoning and conclusion when examining the compatibility of his detention with Article 3 of Protocol No. 1 and the question of "ulterior purpose" in the context of Article 18.

The Court accepted that the time taken by the Constitutional Court to hear the applicant's appeal against his continued remand – thirteen months and four days – could not be considered "speedy" within the meaning of Article 5 § 4 in ordinary circumstances. However, it considered that the length could be considered justified in the particular circumstances of the applicant's case. Importantly, it referred in this connection to the burden placed on the Constitutional Court by the volume of cases which it had had to deal with following the proclamation of the state of emergency following the 2016 failed *coup d'état*.

Reasonably necessary to prevent offence (Article 5 § 1 (c))

S., V. and A. v. Denmark[10] concerned preventive detention to prevent spectator violence in the context of Articles 5 § 1 (c)[11] and 5 §§ 3 and 5.

In October 2009 a large number of football spectators (140 approximately), in Copenhagen to watch a football match, were detained by the police. Half were charged with criminal offences. The other half, including the three applicants, were detained for approximately eight hours under section 5(3) of the Police Act. This provision permitted

9. *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, 5 July 2016.

10. *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018.

11. Article 5 § 1 (c) states: "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" (the text in italics is what is referred to as the second limb of Article 5 § 1 (c)).

detention to avert a risk of disturbance or danger to safety for as short and moderate a period as possible, which should not extend beyond six hours if possible.

The applicants complained of their detention under Article 5 § 1 of the Convention. The Grand Chamber concluded that this purely preventive detention could be lawful under the second limb of Article 5 § 1 (c) and that, since it complied with the relevant safeguards, there had been no violation of Article 5 § 1 of the Convention.

This judgment is noteworthy because it permits, and defines the parameters of, an important tool for controlling the threat of spectator violence namely, preventive detention.

To date, short detention aimed at preventing imminent violence could be lawful either under Article 5 § 1 (b) if it was effected to secure the fulfilment of an incumbent obligation prescribed by law *or* under Article 5 § 1 (c) if it fell within the context of criminal proceedings. The purely preventive detention in issue in the present case did not fall within either of those scenarios, so the Grand Chamber had to examine whether Article 5 § 1 could otherwise provide a mandate for such detention. The judgment is important for the case-law because it reverses the majority position in *Ostendorf v. Germany*[12] and confirms that the second limb of Article 5 § 1 (c) *can* authorise purely preventive detention, while highlighting the applicable safeguards to avoid its arbitrary use.

A number of case-law points are worth noting.

(i) Since the police had not given any orders to the applicants as to the acts from which they were to refrain, their detention could not be covered by Article 5 § 1 (b) of the Convention (contrast the position in *Ostendorf*, cited above, where particular orders had been given allowing the application of Article 5 § 1 (b)).

(ii) The key finding of the Grand Chamber was that the second limb of Article 5 § 1 (c) could be considered an independent basis for a deprivation of liberty. Two issues had to be resolved to reach that conclusion:

(a) Did the second limb exist independently of "a reasonable suspicion of [a person] having committed an offence"? Two lines of case-law had emerged. One, which had begun with *Lawless v. Ireland*[13], considered the second limb to be an autonomous ground of detention[14].

12. *Ostendorf v. Germany*, no. 15598/08, 7 March 2013.

13. *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3.

14. This interpretation continued in *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, and *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, and was further supported

The second, supporting the opposite conclusion, could be traced back to *Ciulla v. Italy*[15], and had had some additional support in the case-law[16] including in *Ostendorf*, cited above. For the Grand Chamber, there were weighty reasons to choose the *Lawless* approach including consistency with the text of Article 5 and the report of the conference of senior officials on human rights to the Committee of Ministers on the second draft of the Convention and the fact that the *Ciulla* judgment had not explained its departure from the earlier *Lawless* judgment. For these reasons and also so as "not to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public", the Grand Chamber concluded that, contrary to the majority in *Ostendorf*, purely preventive detention could be permissible under the second limb of Article 5 § 1 (c) independently of "a reasonable suspicion of [a person] having committed an offence".

(b) Was this second-limb detention subjected to the "purpose" requirement, so that detention would only be lawful if it was for "the purpose of bringing the applicant before the competent authority"? While the *Lawless* judgment confirmed that it was so conditioned, the Grand Chamber considered that the flexibility accepted in later cases[17] should be applied to the present preventive detention context because requiring a subjective intention to bring a person before a judge could have undesirable consequences. In this latter respect, the Grand Chamber was inspired to some extent by a judgment of the United Kingdom Supreme Court[18] where it had been pointed out that short preventive detentions could end up being unnecessarily prolonged by a requirement to bring a detainee before a court. Emphasis was again placed in this context on the need to avoid rendering police duties impracticable having regard to their obligations under, *inter alia*, Articles 2 and 3 to protect the public from offences by private individuals of which the police had or ought to have had knowledge.

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by the breach-of-the-peace cases against the United Kingdom (*Steel and Others v. the United Kingdom*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII; *Nicol and Selvanayagam v. the United Kingdom* (dec.), no. 32213/96, 10 January 2001; and *McBride v. the United Kingdom* (dec.), no. 27786/95, 5 July 2001).

15. *Ciulla v. Italy*, 22 February 1989, Series A no. 148.

16. *Jėčius v. Lithuania,* no. 34578/97, ECHR 2000-IX; *Epple v. Germany* (revision), no. 77909/01, 15 December 2005; *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, ECHR 2011 (extracts); and *Ostendorf*, cited above; see also *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.

17. *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B; *Erdagöz v. Turkey*, 22 October 1997, *Reports of Judgments and Decisions* 1997-VI; and *Petkov and Profirov v. Bulgaria*, nos. 50027/08 and 50781/09, 24 June 2014.

18. *R v. the Commissioner of Police for the Metropolis*, which had preferred the minority view in *Ostendorf*, cited above.

(iii) The Grand Chamber went on to highlight the safeguards necessary to ensure that such preventive detention was neither arbitrary nor disproportionate.

(a) Article 5 § 1: the requirement of domestic lawfulness; the protection from arbitrariness; the requirement for the offence to be "concrete and specific" (as defined in the judgment); and the need for the arrest and detention to be "reasonably necessary". This necessity test, again informed by the need to balance Article 5 with Article 2 and 3 rights, required, *inter alia*, that measures less severe than detention had been found insufficient to protect, that the offence in question was found to have been of a "serious nature, entailing danger to life and limb or significant material damage", and that detention was to cease as soon as the risk passed, an issue requiring monitoring.

(b) Article 5 §§ 3 and 5: since Article 5 § 3 meant that a person who has been released does not need to be brought "promptly" before a judge, the promptness requirement of Article 5 § 3 effectively determined the acceptable length of preventive detention under the second limb of Article 5 § 1 (c). Having reviewed its case-law under that provision, the Grand Chamber considered that "promptly" in the context of preventive detention should be a matter of hours rather than days. A failure to comply with this requirement would also afford the individual an enforceable right to compensation (Article 5 § 5).

(iv) Applying these principles to the present case, the Grand Chamber found that a fair balance had been struck between the right to liberty and the importance of preventing the applicants from organising or taking part in a hooligan brawl. The applicants' preventive detention complied therefore with the second limb of Article 5 § 1 (c) and there had been no violation of Article 5 § 1 of the Convention.

(v) It is interesting to note the emphasis placed throughout the judgment on the need to balance the State's obligations to protect and investigate under Articles 2 and 3 with an individual's Article 5 rights (first articulated in *Osman v. the United Kingdom*[19], and, most recently, in *Akelienė v. Lithuania*[20]).

Persons of unsound mind (Article 5 § 1 (e))

Ilnseher v. Germany[21] concerned preventive detention ordered following a conviction.

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19. *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.

20. *Akelienė v. Lithuania*, no. 54917/13, 16 October 2018.

21. *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, 4 December 2018.

The applicant was found guilty in 1999 of strangling a woman for sexual gratification. He was sentenced to the maximum term of ten years in prison (criminal law relating to young offenders). In 2008, once he had served his sentence, preventive detention was ordered because he was found to be suffering from a mental disorder necessitating treatment and there was a high risk that he would reoffend if released ("subsequent preventive detention"). Further to a unilateral declaration by the Government, the Chamber struck out the applicant's complaints under Articles 5 and 7 concerning his preventive detention in prison until 20 June 2013. On that date he was transferred to the newly built preventive-detention centre offering an intensive treatment programme for sex offenders. In respect of the later period of detention, the Grand Chamber found that there had been no violation of Article 5 §§ 1 or 4, Article 6 § 1 or of Article 7 § 1 of the Convention.

(i) The case concerns the system of subsequent preventive detention in Germany. It is important for Germany since it confirms that the new preventive-detention system, introduced following the Court's leading judgment in *M. v. Germany*[22], is compatible with Articles 5 and 7 of the Convention.

Historically the German Criminal Code distinguished between penalties (strictly necessary to punish) and measures of "correction and prevention" (therapeutic and/or to protect the public). Legislation from 2004 allowed preventive detention (a measure of correction and prevention) to be imposed, even if the order had not been made at the sentencing stage, if the detainee was thought to pose a risk to the public. In the leading judgment in *M. v. Germany* (cited above), the Court found that preventive detention, extended after conviction and beyond that detention's initial maximum duration, was not lawful under Article 5 § 1 (a), (c) or (e) and that it amounted to a penalty which had been retroactively imposed/prolonged in breach of Article 7 § 1, because preventive detention without a therapeutic purpose was considered to be a penalty, even when carried out during the maximum duration of the original sentence/measure. There followed an important judgment of the Constitutional Court in 2011; the Preventive Detention (Distinction) Act in 2013, which permitted subsequent preventive detention only if the person concerned suffered from a mental disorder rendering the person dangerous; and the building of new preventive-detention centres offering an adapted therapeutic environment. In later Chamber judgments, the Court found this new regime to be Convention compatible. In particular, in *Bergmann v. Germany*[23], the Court found

22. *M. v. Germany*, no. 19359/04, ECHR 2009.

23. *Bergmann v. Germany*, no. 23279/14, 7 January 2016.

that the subsequently prolonged preventive detention of the applicant for a mental disorder requiring treatment was justified under Article 5 § 1 (e) and did not amount to a penalty within the meaning of Article 7 of the Convention (see also *W.P. v. Germany*[24] and *Becht v. Germany*[25]).

The present case, although concerning the criminal law relating to young offenders, is a similar case to that in *Bergmann*, cited above, and the Grand Chamber has confirmed that Chamber case-law and, thus, the compatibility with the Convention of the post-2013 system of preventive detention in Germany.

(ii) The judgment also sets out the relevant general principles in more detail than the Chamber judgment and thus constitutes a valuable reference for the case-law on the detention of persons of unsound mind under Article 5 § 1 (e), including on the need for there to be a relationship between the ground of permitted deprivation of liberty and the place/conditions of detention. In this latter respect, the Grand Chamber confirmed prior Chamber case-law (*W.P. v. Germany*, cited above) to the effect that a person's detention can become lawful if the conditions of detention change (in this case, once the applicant was transferred to the new adapted preventive-detention centre), even if the detention is still based on the original detention order.

(iii) Similarly, the Grand Chamber judgment also provides a restatement of the general principles under Article 7 as regards the concept of "penalty" for the purposes of Article 7 § 1, confirming again an interesting case-law point evoked in prior Chamber case-law.

The conditions of execution of detention can be relevant for the nature/purpose and severity of a detention measure and thus for the assessment of whether or not the measure is a "penalty". Since those conditions changed during the impugned period of detention, it was necessary to assess whether it was the conditions of detention when the measure was ordered or during the later period under review which were relevant for assessing whether the measure in question was a "penalty". The Grand Chamber again confirmed the approach in *W.P. v. Germany*: in certain cases, especially if national law does not qualify a measure as a penalty and if its purpose is therapeutic, a substantial change in the conditions of execution of the detention measure can withdraw or erase the initial qualification of the measure as a "penalty", even if that measure is implemented on the basis of the same detention order. The wording of the second sentence of Article 7 § 1, according to which no heavier penalty may be "imposed" than the one that was

24. *W.P. v. Germany*, no. 55594/13, 6 October 2016.
25. *Becht v. Germany*, no. 79457/13, 6 July 2017.

applicable at the time the criminal offence was committed, did not stand in the way of such an interpretation. In so finding, the Grand Chamber clarified that certain criteria by which one determines whether a measure amounts to a penalty are "static" (not susceptible to change once the measure is ordered, such as whether the measure was imposed following conviction for a "criminal offence") and certain are "dynamic" (thus susceptible to change over time such as the manner in which the measure was executed).

Accordingly, the relevant period for assessing whether the subsequent preventive detention measure was a "penalty" within the meaning of Article 7 § 1 was the period after 20 June 2013, during which the measure was implemented in accordance with the new legislative framework and thus it could no longer be classified as a penalty within the meaning of Article 7 § 1 so that there had been no violation of that provision.

Speediness of review (Article 5 § 4)[26]

Mehmet Hasan Altan v. Turkey and *Şahin Alpay v. Turkey*[27] concerned the length of the review of the lawfulness of the pre-trial detention of journalists arrested during an attempted *coup d'état*.

Following the attempted *coup* in Turkey during the night of 15 to 16 July 2016, on 20 July 2016 the Government declared a state of emergency and on 21 July 2016 notified the Secretary General of the Council of Europe of its derogation from certain of its Convention obligations. The applicants, well-known journalists, were arrested and held in pre-trial detention on anti-terrorism charges related to the attempted *coup*. The Constitutional Court found that their arrest and detention violated their rights to liberty and to freedom of expression, awarded damages and costs and expenses and, since the applicants were in detention, the Constitutional Court notified the judgments to the relevant assize court for that court to "do the necessary". The assize court, considering that the Constitutional Court judgments were not binding, did not act on them and the applicants remained in detention. Under Article 5 § 4 of the Convention, the applicants complained of the length of the review of the lawfulness of their pre-trial detention.

The Court did not consider that the length (fourteen and sixteen months respectively) of the review of the lawfulness of the applicants' pre-trial detention by the Constitutional Court breached the speediness

26. *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018 (not final).

27. *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018. See also under Article 15 (Derogation in time of emergency) below.

requirement of Article 5 § 4 of the Convention. The Court recognised that this was on the borderline of what could be considered speedy even taking into account the exceptional burden of work the Constitutional Court had after the failed *coup* attempt in 2016. However, those in pre-trial detention could request their release at any time and appeal any refusal of release: the applicants had made several such requests, each of which was examined speedily. Pre-trial detention was automatically reviewed a minimum of every thirty days. In such a system, the Court could tolerate that the review conducted by the Constitutional Court, which had seen a drastic increase in its caseload since 2016, could take more time. Accordingly, and repeating that the length of the Article 5 § 4 review by the Constitutional Court had been close to the limit of what could be considered speedy, that duration did not, in the particular circumstances of the case, give rise to a violation of Article 5 § 4 of the Convention. The Court reserved the possibility of reviewing this conclusion in any future cases.

PROCEDURAL RIGHTS

Right to a fair hearing in civil proceedings (Article 6 § 1)

Applicability[28]

In *Denisov v. Ukraine*[29], the Court examined the applicability of Article 6 § 1 to disputes concerning the mandates of judges.

The applicant was dismissed from the position of President of the Kyiv Administrative Court of Appeal on the basis of a failure to perform his administrative duties properly. He remained as a judge in the same court. He complained, *inter alia*, under Article 6 that the proceedings before the High Council of Justice and the Higher Administrative Court concerning his removal had not been independent or impartial.

The Court summarised in some detail the relevant case-law and principles concerning the application of Article 6 to disputes concerning the mandates of judges. Article 6 was found to apply under its civil head (*Vilho Eskelinen and Others v. Finland*[30], and *Baka v. Hungary*[31]) and to have been violated: the High Council of Justice lacked independence and impartiality, defects not remedied by the Higher Administrative Court (*Oleksandr Volkov v. Ukraine*[32]).

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28. See also, under Article 6 § 1 (Access to a court) below, *Naït-Leman v. Switzerland* [GC], no. 51357/07, 15 March 2018.

29. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018. See also under Article 8 (Private life) below, and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018.

30. *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.

31. *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.

32. *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013.

Mirovni Inštitut v. Slovenia[33] concerns the applicability of Article 6 to a call for tenders procedure.

The applicant institute submitted an application for research funding in response to a call for tenders procedure launched by the responsible government department. Its application was rejected. The applicant institute challenged the decision in proceedings before the Administrative Court, claiming (among other matters) that the persons tasked with evaluating the competing applications had been biased. It requested an oral hearing, but the court dismissed the action without holding a hearing. In the Convention proceedings the applicant alleged that this failing amounted to a violation of Article 6 § 1 of the Convention. The Court applied its standard case-law principles in this area to the circumstances of the applicant's case and found that there had been a violation.

The judgment is noteworthy as regards the Court's treatment of the applicability of Article 6 to the litigation arising out of the applicant's unsuccessful tender. It would appear from the case-law up to that point that the fact that an unsuccessful tenderer had the right to object to an award and to have the objections considered at a public hearing did not amount to a civil right, but merely to a right of a public nature. A right to object to an award did not suffice to make Article 6 applicable to proceedings determining the award of a tender, in view of the discretion vested in the body adjudicating on the competing bids to decide who should be granted the tender (see, for example the approach followed in *I.T.C. LTD v. Malta*[34]; see also *Marti AG and Others v. Switzerland*[35]; *Skyradio AG and Others v. Switzerland*[36]; and *S.C. Black Sea Caviar S.R.L. v. Romania*[37].

In the instant case, the Court decided to revisit that line of authority, noting that the applicant did not have a right to an award of funding and that the domestic authorities exercised their discretion in examining the merits of the competing bids. It took as its starting-point the principles recently developed by the Grand Chamber in *Regner v. the Czech Republic*[38]. In that case the Grand Chamber observed in paragraph 105 of its judgment that

> "[i]n some cases, lastly, national law, while not necessarily recognising that an individual has a subjective right, does confer

33. *Mirovni Inštitut v. Slovenia*, no. 32303/13, 13 March 2018.
34. *I.T.C. LTD v. Malta* (dec.), no. 2629/06, 11 December 2007.
35. *Marti AG and Others v. Switzerland* (dec.), no. 36308/97, ECHR 2000-VIII.
36. *Skyradio AG and Others v. Switzerland* (dec.), no. 46841/99, 31 August 2004.
37. *S.C. Black Sea Caviar S.R.L. v. Romania* (dec.), no. 13013/06, 31 May 2016.
38. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017 (extracts).

> the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may set it aside. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right."

The Court found that statement to be relevant in the instant case (paragraph 29), where the applicant institute

> "... clearly enjoyed a procedural right to the lawful and correct adjudication of the tenders. Should the tender be awarded to the applicant institute, the latter would have been conferred a civil right."

Article 6 was therefore applicable.

The judgment marks the first concrete application of the above-mentioned *Regner* judgment to an inquiry into the applicability of Article 6 and illustrates how Convention law on applicability has developed. Interestingly, the Chamber concluded its analysis by recalling that (paragraph 29 *in fine*)

> "... there has been a shift in the Court's case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual (see De Tommaso v. Italy [GC], no. 43395/09, § 151, 23 February 2017)."

Access to a court[39]

The *Naït-Liman v. Switzerland*[40] judgment concerned whether domestic courts are obliged under international law to accept actions for damages by victims of acts of torture committed extraterritorially by, or under the jurisdiction of, a third State.

The applicant alleged that he had been detained and tortured in Tunisia in 1992, on the order of the then Minister of the Interior. He was granted political asylum in Switzerland in 1995. In 2004 he brought proceedings in Switzerland against Tunisia and the Minister

39. See also, under Article 6 § 1 (Independent and impartial tribunal) below, *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018 (not final).

40. *Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018.

for compensation for non-pecuniary damage arising from alleged acts of torture. The Swiss courts refused to entertain the action, the Federal Supreme Court finding that the Swiss courts lacked jurisdiction under the "forum of necessity"[41] given the lack of connection between the facts of the case and Switzerland (section 3 of the Federal Law on private international law)[42].

The applicant complained under Article 6 § 1 that this refusal to examine the merits of his action breached his right of access to court. The Grand Chamber found no violation of that provision.

The Grand Chamber emphasised, at the outset, the broad international consensus recognising the existence of a right for victims of torture to obtain compensation. There was little doubt for the Grand Chamber that this right was binding on States as regards acts perpetrated within the forum territory or by persons within its jurisdiction. The question to be clarified in the present case was whether that right extended to acts committed extraterritorially by, or under the jurisdiction of, a third State.

This judgment is noteworthy in that the Grand Chamber was required to set out its view as to the content of the international legal principles of "universal civil jurisdiction" and "forum of necessity" with a view to establishing whether the Swiss courts had been obliged by international law to accept the applicant's action in compensation for acts of torture alleged to have been committed in Tunisia by order of its Minister of the Interior. Whether the Swiss courts had been so obliged would, in turn, determine the scope of the applicable margin of appreciation and, thus, the proportionality of the impugned restriction placed on the applicant's access to those courts.

(i) Article 6 was considered to be applicable as the applicant had a claim to a right which was, at least on arguable grounds, recognised under Swiss law. In this respect the Grand Chamber relied not only on the general principle of civil liability for unlawful acts under domestic law, but also on elements of international law and, notably, Article 14 of the Convention against Torture[43] which guarantees a right "firmly embedded, as such, in general international law" of victims of acts of

41. An exceptional or residual jurisdiction assumed by a State's civil courts where proceedings abroad prove impossible or excessively and unreasonably difficult (for the detailed definition, see paragraph 180 of the Grand Chamber judgment).

42. It was not therefore necessary for that court, nor therefore for the Grand Chamber, to examine the question of any possible immunities from jurisdiction (such as in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI).

43. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

torture to obtain redress and to fair and adequate compensation. The Convention against Torture had been ratified by Switzerland; its provisions were part of domestic law and the authorities were required to comply with them. The dispute as to the extraterritoriality of that right was not considered to be decisive for the applicability of Article 6 of the Convention.

(ii) The Grand Chamber went on to review international customary law (based mainly on this Court's comparative study) and treaty law on *universal civil jurisdiction* to find that the Swiss courts were not required to accept the applicant's action:

> "187. ... it has to be concluded that those States which recognise universal civil jurisdiction – operating autonomously in respect of acts of torture – are currently the exception. Although the States' practice is evolving, the prevalence of universal civil jurisdiction is not yet sufficient to indicate the emergence, far less the consolidation, of an international *custom* which would have obliged the Swiss courts to find that they had jurisdiction to examine the applicant's action.
>
> 188. The Court considers that, as it currently stands, international *treaty* law also fails to recognise universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State." (Emphasis added.)

In this respect, the Grand Chamber closely examined the interpretation to be given to Article 14 of the Convention against Torture, concluding that neither the findings of the Committee against Torture, the text of Article 14 itself nor the *travaux préparatoires* required a State to recognise universal jurisdiction, even if certain recent and non-binding documents encouraged States in that direction.

Furthermore, the Grand Chamber also found that there was neither an international customary rule enshrining the concept of the "forum of necessity" nor any international treaty obligation providing for this.

Accordingly, in the absence of a requirement imposed by international law, the margin of appreciation open to the respondent State had been "wide". Finding that the Swiss courts' interpretation of section 3 of the Federal Law on private international law to reject the applicant's action had not exceeded that margin, that decision was not disproportionate to the legitimate aims pursued so that there had been no violation of Article 6 of the Convention. The recent case of *Arlewin v. Sweden*[44] was distinguished: given the strength of the links between

44. *Arlewin v. Sweden*, no. 22302/10, 1 March 2016.

that claim and Sweden, the question of a possible forum of necessity did not arise in that case.

(iii) Finally, it is worth noting that, in its concluding remarks, the Court nevertheless encouraged States towards progress in this respect.

The Grand Chamber emphasised that its finding of no violation did not call into question the broad international consensus on the right for victims of torture to obtain appropriate and effective redress, or the fact that the States were "encouraged to give effect to this right by endowing their courts with jurisdiction to examine such claims for compensation, including where they are based on facts which occurred outside their geographical frontiers". Efforts made by States in this regard were commendable. While it was not unreasonable for a State to make the exercise of a forum of necessity conditional on the existence of certain connecting factors with that State, the Court did not rule out the possibility of developments in the future given the dynamic nature of this area. Although it found no violation in the present case,

> "the Court invites the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it".

Zubac v. Croatia[45] concerned issues of foreseeability and proportionality of limitation on access to a court.

The application concerns the Croatian Supreme Court's refusal to consider an appeal in a property claim. The applicant's late husband was a claimant in civil proceedings. He valued his action, in his statement of claim, at 10,000 Croatian Kuna ((HRK), approximately 1,300 euros (EUR)). Later during the proceedings, he valued it at HRK 105,000 (EUR 14,000 approximately). The latter amount was accepted by the first and second-instance courts, with court fees being calculated on that basis. The Supreme Court declared his appeal inadmissible *ratione valoris* considering that the relevant value of his claim was the one indicated in the initial statement of claim (HRK 10,000) and that value did not reach the statutory threshold (HRK 100,000) at which access to the Supreme Court became a matter of right (section 382(1)(1) of the Civil Procedure Act).

The Chamber concluded that there had been no violation of the Convention.

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45. *Zubac v. Croatia* [GC], no. 40160/12, 5 April 2018.

The scope of this case is very specific. There was no dispute as to, nor was there reason to doubt given the case-law of the Court, the legitimacy and permissibility of *ratione valoris* restrictions on access to the Supreme Court or the margin of appreciation of the authorities in regulating the modalities of such restrictions. The present case rather concerned the manner in which the implementation of *ratione valoris* requirements could be assessed.

The judgment is interesting in that it provides a comprehensive and structured outline of the Court's case-law concerning restrictions on access to a court and, more specifically, restrictions on access to the superior courts. From this case-law, the Grand Chamber extracted certain criteria to be taken into account when deciding whether restrictions, in particular those related to *ratione valoris*, on access to courts of appeal/cassation comply with the requirements of Article 6 § 1 of the Convention.

In the first place, the Court has to assess the scope of the above-noted *margin of appreciation* as regards the manner of application of the said rules to an instant case. In making that assessment, the Court would have regard to (i) the extent to which the case had been examined before the lower courts; (ii) the existence of any issues related to the fairness of the proceedings conducted before the lower courts; and (iii) the nature of the role of the Supreme Court.

Secondly, and to assess the *proportionality* of the restriction, the Court has, to varying degrees, taken account of certain other factors: (i) the foreseeability of the restriction; (ii) whether it is the applicant or the respondent State who should bear the adverse consequences of the errors made during the proceedings that led to the applicant being denied access to the Supreme Court; and (iii) whether the restrictions in question could be said to involve "excessive formalism". The Grand Chamber proceeded to explain each of these criteria in detail.

– As regards the second criterion of bearing the adverse consequences of errors made, the Grand Chamber confirmed that, when procedural errors occur both on the side of the applicant and the relevant authorities, there was no clear-cut rule in the case-law as regards who should bear the burden. While the solution would depend on all the circumstances, some guiding criteria were discernable from the Court's case-law: whether the applicant was represented; whether the applicant/legal representative displayed the requisite diligence in pursuing the relevant procedural actions, procedural rights usually going hand in hand with procedural obligations; whether the errors could have been avoided from the outset; and whether the errors are mainly or objectively attributable to the applicant or to the courts.

– With regard to the third criterion concerning "excessive formalism", the Grand Chamber acknowledged the competing interests at stake. On the one hand, the observance of formalised rules of civil procedure is "valuable and important as it is capable of limiting discretion, securing equality of arms, preventing arbitrariness, securing the effective determination of a dispute and adjudication within a reasonable time, and ensuring legal certainty and respect for the court". On the other hand, it is "well-enshrined" in the Court's case-law that "excessive formalism" can run counter to the requirement of securing a practical and effective right of access to a court under Article 6 § 1 of the Convention. Issues of "legal certainty" and "proper administration of justice" were considered by the Grand Chamber to be the two central elements for drawing a distinction between excessive formalism and an acceptable application of procedural formalities so that the right of access to a court is considered impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court.

Finally, the Grand Chamber went on to apply the above principles to the present facts, concluding that there had been no violation of Article 6 of the Convention. The State had a wide *margin of appreciation* as regards the manner of application of the said rules to an instant case: the applicant's case had been heard by two instances exercising full jurisdiction in the matter, no discernible lack of fairness arose in the case, and the Supreme Court's role was limited to reviewing the application of the relevant domestic law by the lower courts. Neither was the Supreme Court's decision a *disproportionate* hindrance: access to the Supreme Court was found to be regulated in a coherent and foreseeable manner; the errors made were mainly and objectively imputable to the applicant on whom the adverse consequences fell, and it could not be said that the Supreme Court's decision declaring the applicant's appeal on points of law inadmissible amounted to excessive formalism involving an unreasonable and particularly strict application of procedural rules unjustifiably restricting the applicant's access to its jurisdiction.

Kurşun v. Turkey[46] concerned the destruction of the applicant's property as a result of an explosion at an oil refinery.

Several investigations were conducted into, among other things, the cause of the explosion and responsibility for it. The conclusions of

46. *Kurşun v. Turkey*, no. 22677/10, 30 October 2018. See also under Article 1 of Protocol No. 1 (Positive obligations) below.

the different investigations were not entirely conclusive as regards the issue of responsibility. Criminal proceedings initiated against a number of executives of Tüpraş were ultimately discontinued for reasons of prescription. The applicant took civil proceedings against Tüpraş, but his claim for compensation was finally dismissed by the Court of Cassation because of his failure to comply with the one-year time-limit for suing a tortfeasor contained in Article 60 § 1 of the former Code of Obligations. According to that provision, tort actions had to be brought within one year of the date on which the victim acquired knowledge of both the damage *and* the identity of those responsible. In the opinion of the Court of Cassation, the applicant should be considered to have known that Tüpraş was responsible for the explosion on the date it occurred. His claim was therefore out of time.

In the Convention proceedings, the applicant complained of the above events under Article 6 of the Convention and Article 1 of Protocol No. 1.

The Court found a breach of Article 6 as regards the manner in which the relevant chamber of the Court of Cassation interpreted and applied the time-limit in the applicant's civil action. Among other matters, it observed that only a few months before the dismissal of the applicant's claim another chamber of the Court of Cassation had examined compensation claims brought against Tüpraş by other victims of the same explosion. That chamber had interpreted the time-limit rule in the victims' favour notwithstanding the fact that their claims had not been brought within one year of the date of the explosion. For the Court, the difference in approach suggested a lack of clarity in the interpretation of the relevant time-limit rule in the context of the present facts. Furthermore, the chamber which examined and dismissed the applicant's claim did not provide any reasons for departing from the earlier decisions. Of particular interest is the fact that the Court further stressed that the interpretation of limitation periods in disregard of relevant circumstances may give rise to an unjustified restriction on the right of access to a court. Having regard to what it described as "the extraordinary circumstances of the incident" (paragraph 104), it observed (paragraph 103) that

> "... the Court of Cassation's interpretation and application of the relevant time-limit rule, whereby the applicant was required to institute proceedings at a moment when he could not realistically have sufficient knowledge of the cause of the damage or the identity of those responsible, seems very formalistic ..."

The above combination of factors led the Court to conclude that the applicant had been denied access to a court in breach of Article 6. The Court's finding had implications for part of its reasoning under Article 1 of Protocol No. 1.

Fairness of the proceedings[47]

In *Ramos Nunes de Carvalho e Sá v. Portugal*[48], the Grand Chamber examined the review by a judicial body of disciplinary proceedings against a judge and the issues of the independence and impartiality of that body, the scope of the review and the lack of a public hearing.

The case concerns three sets of disciplinary proceedings against the applicant judge which led to 240 days' suspension from duty imposed by the High Council of the Judiciary ("CSM"). The Judicial Division of the Supreme Court reviewed and upheld those disciplinary decisions and penalties.

The applicant complained mainly under Article 6 § 1. The Grand Chamber found the complaint concerning the independence and impartiality of the CSM to be inadmissible (out of time) and her complaint under Article 6 § 3 (a) and (b) incompatible *ratione materiae*. It concluded that there had been no violation of Article 6 § 1 (civil) as regards the independence and impartiality of the Judicial Division of the Supreme Court and found a violation of that provision because the scope of its review was insufficient and the applicant did not have a public hearing.

This case does not concern the more usual context, in which the Court has assessed the judicial review of the exercise of administrative discretion in a specialised area of the law (planning, social welfare, etc.), but rather judicial review of a disciplinary decision concerning a judge. The Grand Chamber's finding that the court conducting this judicial review did not lack independence or impartiality is important for legal and constitutional arrangements in Portugal and, by extrapolation, other jurisdictions. In assessing the sufficiency of that judicial review, the Grand Chamber adapted the *Bryan* criteria (*Bryan v. the United Kingdom*[49]) to reflect the specificity and importance of the role of judges and the judiciary in a democratic State.

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47. See also, under Article 6 § 1 (Independent and impartial tribunal) below, *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018 (not final), as regards the right to be heard in public.

48. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018. See also under Article 6 § 1 (Independent and impartial tribunal) and Article 6 § 1 (Right to a fair hearing in criminal proceedings) below, and *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

49. *Bryan v. the United Kingdom*, 22 November 1995, Series A no. 335-A.

(i) The Grand Chamber reviewed separately the complaint concerning the lack of independence and impartiality of the Judicial Division of the Supreme Court, finding no violation of Article 6 in that regard.

(ii) As to the other two complaints under Article 6 (the scope of the judicial review and the lack of a hearing, examined together), the Grand Chamber, as noted above, adapted the *Bryan* criteria to the particular context of the judicial review of disciplinary proceedings against judges.

(a) The first of the *Bryan* criteria, that judicial review had to be appropriate to the "subject matter of the dispute" (in the present case, disciplinary administrative decisions), was considered to apply with even greater force to such proceedings against judges who had to "enjoy the respect that is necessary for the performance of their duties". Disciplinary proceedings involved particularly serious consequences for the lives and careers of judges: the present accusations were liable to result in the applicant's removal from office or suspension from duty and thus "very serious penalties which carried a significant degree of stigma". When a State initiates such disciplinary proceedings, public confidence in the functioning and independence of the judiciary is at stake; and in a democratic State, this confidence guarantees the very existence of the rule of law. Furthermore, the Court stressed the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary.

(b) As to the second *Bryan* criterion (procedural guarantees before the CSM), the Grand Chamber found that there were indeed certain guarantees. However, the lack of a hearing before the CSM meant that it did not exercise its discretionary powers on an adequate factual basis.

(c) Under the third *Bryan* criterion (the proceedings before the Judicial Division), the Grand Chamber examined four matters: the issues submitted for consideration; the methods used; the decision-making powers of the court; and the reasons for its decisions. The Grand Chamber focused on the complaint concerning the lack of a public hearing and the judgment is again pedagogical in its review of the case-law in this respect (§§ 188, 190-191 and 210), which case-law confirms that, in the context of disciplinary proceedings, dispensing with a public hearing should be exceptional and had to be justified in the light of the Court's case-law. Having regard, in particular, to the complex legal and decisive factual issues in dispute, the case should not have been dealt with on the papers alone, the Grand Chamber again emphasising the importance and specificity of the role of judges and the judiciary.

The Grand Chamber concluded as follows.

> "214. ... in the circumstances of the present case – taking into consideration the specific context of disciplinary proceedings

> conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM were limited, and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial-review stage, meant that the applicant's case was not heard in accordance with the requirements of Article 6 § 1 of the Convention."

Independent and impartial tribunal[50]

The judgment in *Ramos Nunes de Carvalho e Sá v. Portugal*[51] concerned, among other things, the independence and impartiality of a judicial body during disciplinary proceedings against a judge.

It is worth noting that one aspect of the present complaint – that the Supreme Court judges of the Judicial Division were by definition under the authority of the High Council of the Judiciary ("CSM") as regards their own careers and disciplinary matters – was found to constitute an independence and impartiality problem in *Oleksandr Volkov v. Ukraine*[52]. However, the present Grand Chamber distinguished the *Oleksandr Volkov* finding, because the Portuguese disciplinary body, the CSM, did not disclose the serious structural deficiencies and bias as the Ukrainian HCJ (this reasoning was recently confirmed in *Denisov v. Ukraine*[53]). Interestingly from the point of view of other legal systems, the Grand Chamber commented as follows.

> "163. ... In more general terms the Court considers it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her

50. See also, under Article 6 § 1 (Right to a fair hearing in civil proceedings) above, *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

51. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Fairness of the proceedings) above and Article 6 § 1 (Right to a fair hearing in criminal proceedings – Applicability) below.

52. *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013.

53. *Denisov v. Ukraine* [GC], no. 76639/11, §§ 68-72, 25 September 2018.

> individual situation. Even in the context of disciplinary cases a theoretical risk of this nature, consisting in the fact that judges hearing cases are themselves still subject to a set of disciplinary rules, is not in itself a sufficient basis for finding a breach of the requirements of impartiality."

Accordingly, and given the particular guarantees shielding the judges of the Judicial Division from outside pressures, the present applicant's fears about a lack of independence/impartiality based on this aspect were considered not to be objectively justified.

Mutu and Pechstein v. Switzerland[54] concerned the settlement of disputes by means of arbitration and the implications for procedural fairness guaranteed by Article 6.

The applicants, a professional footballer and a professional speed skater respectively, were involved in proceedings before the Court of Arbitration for Sport ("the CAS") in Lausanne. The CAS operates within the framework of an independent private-law foundation. It was set up for the purposes of hearing disputes arising in the international sports sector (for example, contractual disputes between footballers and their clubs in the case of the first applicant and the imposition of disciplinary sanctions in the case of the second applicant). An appeal against the CAS's decisions may be filed with the Swiss Federal Tribunal. The applicants complained that the proceedings before the CAS were unfair because the panels which heard their cases lacked independence and impartiality. The applicants' appeals to the Swiss Federal Tribunal were unsuccessful. Both applicants complained in the Convention proceedings under Article 6 (on different grounds – see below) of a lack of independence and impartiality of the CAS. The second applicant also complained that neither the CAS nor the Swiss Federal Tribunal had held a public hearing in her case. The Court found a breach of the Convention only in respect of the lack of a public hearing before the CAS in the case of the second applicant.

The judgment is of interest in that it provides a further illustration of the interplay between Convention law and the international regulatory regimes which apply to professional sportsmen and women (see, most recently, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*[55]). Importantly, the instant case also allowed

54. *Mutu and Pechstein v. Switerland*, nos. 40575/10 and 67474/10, 2 October 2018 (not final).

55. *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, 18 January 2018. See also under Article 8 (Private and family life and home) below.

the Court the possibility to review its case-law under Article 6 on the use of arbitration mechanisms and the consequences this entails for the right of access to a court or tribunal and the application of the corresponding guarantees of a fair procedure. An essential consideration for the Court in this case was whether, by opting to have their grievances dealt with by the CAS and not by a domestic court or tribunal, the applicants had freely waived the benefit of the procedural-fairness guarantees of Article 6, or at least some of them. The Government contended that, with the exception of the appeal proceedings before the Swiss Federal Tribunal, both applicants had voluntarily waived their right to have their civil rights determined by a court in accordance with Article 6 fairness requirements.

The Court has clarified over the years in its case-law that the resolution of civil disputes by means of arbitration rather than in the ordinary national courts is compatible with Article 6. It has underscored the advantages of arbitration over litigation in court when it comes to the settlement of commercial disputes. The instant case allowed it the opportunity to confirm that that conclusion was equally valid for the professional-sports sector, noting in the instant case the possibility of an ultimate review of the fairness of the CAS proceedings by the Swiss Federal Court.

The central question was whether the arbitration procedure had been imposed on the applicants. The Court's case-law in this area has distinguished between voluntary and forced arbitration, the circumstances being determinative of the category into which a particular case falls (*Suda v. the Czech Republic*[56]; *Tabbane v. Switzerland*[57]; *Suovaniemi and Others v. Finland*[58]; *Eiffage S.A. and Others v. Switzerland*[59]; and *Transado-Transportes Fluviais do Sado, S.A. v. Portugal*[60]).

It is noteworthy that the Court found that the second applicant had no choice but to take her case to the CAS. It was clear from the rules of the International Skating Union that disputes had to be brought before the CAS on pain of exclusion from international competitions. The second applicant could not be said to have freely waived her right to benefit from the protection of Article 6, in particular the right to a public hearing before an independent and impartial tribunal.

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56. *Suda v. the Czech Republic*, no. 1643/06, 28 October 2010.
57. *Tabbane v. Switzerland* (dec.), no. 41069/12, 1 March 2016.
58. *Suovaniemi and Others v. Finland* (dec.), no. 31737/96, 23 February 1999.
59. *Eiffage S.A. and Others v. Switzerland* (dec.), no. 1742/05, 15 September 2009.
60. *Transado-Transportes Fluviais do Sado, S.A. v. Portugal* (dec.), no. 35943/02, 16 December 2003.

Interestingly, the Court found that the first applicant had not been obliged to accept the compulsory jurisdiction of the CAS. According to the relevant international regulations, footballers had a choice in the matter. How that choice was to be exercised was a question to be answered in the context of the contractual negotiations between them and their clubs. The first applicant had agreed in his contract with his club to have recourse to the jurisdiction of the CAS and not to that of the national courts in the event of litigation between them. That said, it is noteworthy that the Court went on to find that the first applicant could not be considered to have unequivocally consented to have his case heard by a panel of the CAS lacking independence and impartiality. It was significant for the Court that the first applicant, using the rules governing proceedings before the CAS, had in fact sought to challenge one of the arbitrators on the panel. The proceedings should therefore have offered the first applicant, like the second applicant, the guarantees of Article 6.

Turning to the merits of the applicants' complaints, the Court found in the light of its established case-law and the reasons adduced by the Swiss Federal Tribunal in the appeal proceedings that neither of the arbitrators impugned by the first applicant had lacked impartiality. There had been no breach of Article 6 in his case.

The second applicant claimed that the manner of appointment of members to the panels of the CAS had created a structural problem which undermined the independence and impartiality of the panels. In essence, she argued that the rules which applied at the time of her arbitration proceedings allowed for the over-representation on CAS panels of appointees of the governing sports federations to the detriment of the representation of athletes, who had, moreover, no say in the manner in which their representatives were to be chosen, in contrast to commercial arbitration proceedings. The Court rejected the second applicant's argument. It was crucial for its reasoning that, while accepting that the governing sports federations were able to influence the appointment of arbitrators, the second applicant had not advanced any arguments which cast doubt on the independence and impartiality, in general, of those approximately 300 persons who featured on the list of possible arbitrators at the time of her proceedings. The Swiss Federal Tribunal had reached a similar conclusion.

The Court found a breach of Article 6 in that the second applicant had not had a public hearing before the CAS. She had not waived her right to a public hearing; she had in fact requested one during the arbitration proceedings. In the view of the Court, the issues she had raised deserved

to be examined given that they raised among other things disputed questions of fact leading to the sanction imposed on her. This aspect of the judgment is of interest in view of its comprehensive treatment of the circumstances in which a public hearing is required by Article 6.

Right to a fair hearing in criminal proceedings (Article 6 § 1)

Applicability

In *Ramos Nunes de Carvalho e Sá v. Portugal*[61], the Chamber had found it unnecessary to examine the complaints under the criminal head of Article 6. However, the Grand Chamber observed that it was competent to examine these complaints because they had been declared admissible (*Öneryıldız v. Turkey*[62], and *Kurić and Others v. Slovenia*[63]) and, since the civil and criminal aspects of Article 6 were not necessarily mutually exclusive, it was of the view that it should examine them. It ultimately found that Article 6 did not apply under its criminal head. The judgment provides a useful review of the application of the *Engel and Others v. the Netherlands*[64] criteria to determine whether disciplinary proceedings against various professionals (including lawyers, notaries, civil servants, doctors, members of the armed forces, liquidators and judges) could be considered "criminal".

Fairness of the proceedings[65]

In *Baydar v. the Netherlands*[66], the Court examined the scope of a final court's obligation to give reasons for refusing a request for a preliminary ruling from the Court of Justice of the European Union (CJEU).

The applicant lodged a cassation appeal with the Supreme Court, contesting his conviction for, among other things, people trafficking. In his reply to the Advocate General's observations on his grounds of appeal, he requested that the Supreme Court seek a preliminary ruling from the CJEU on the interpretation of a matter of European Union law.

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61. *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Fairness of the proceedings) and Article 6 § 1 (Independent and impartial tribunal) above.

62. *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

63. *Kurić and Others v. Slovenia* [GC], no. 26828/06, ECHR 2012 (extracts).

64. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

65. See also, under Article 6 § 3 (c) (Defence through legal assistance) below, *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018.

66. *Baydar v. the Netherlands*, no. 55385/14, 24 April 2018.

The Supreme Court rejected the applicant's appeal (with the exception of the ground relating to the length of the proceedings). Referring to section 81(1) of the Judiciary (Organisation) Act, the Supreme Court stated that its decision required no further reasoning "as the grievances do not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development".

The applicant complained in the Convention proceedings that the unreasoned refusal of his request for a preliminary ruling breached Article 6 § 1 of the Convention. The Court found that there had been no breach of that Article.

The judgment is noteworthy in that this is the first time the Court has addressed at length the interaction between its case-law on, firstly, the scope of the requirement to give reasons for a refusal to refer a question to the CJEU for a preliminary ruling (see, in this connection, *Ullens de Schooten and Rezabek v. Belgium*[67]; *Vergauwen and Others v. Belgium*[68]; and *Dhahbi v. Italy*[69]) and, secondly, the Court's acceptance that a superior court may dismiss an application for appeal on the basis of summary reasoning (see *Wnuk v. Poland*[70]; *Gorou v. Greece (no. 2)*[71]; and *Talmane v. Latvia*[72], with further references). It is of interest that the Court's reasoning in the instant case was situated within the framework of an accelerated procedure for the disposal of appeals in cassation in the interests of efficiency. This procedure enables the Supreme Court to reject an appeal if it does not constitute grounds for overturning the judgment appealed against and does not give rise to the need for a determination of legal issues (section 81(1) of the Judiciary (Organisation) Act), and to declare an appeal inadmissible as having no prospect of success (section 80a of the same Act).

On the first point, the Court summarised the position as follows in *Dhahbi* (cited above, § 31).

> "– Article 6 § 1 requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;
>
> – when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning;

67. *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011.
68. *Vergauwen and Others v. Belgium* (dec.), no. 4832/04, 10 April 2012.
69. *Dhahbi v. Italy*, no. 17120/09, 8 April 2014.
70. *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009.
71. *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 41, 20 March 2009.
72. *Talmane v. Latvia*, no. 47938/07, § 29, 13 October 2016.

> – whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law;
>
> – in the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (current Article 267 of the Treaty on the Functioning of the European Union (TFEU)), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt."

Regarding the second point – the dismissal of an appeal by a superior court using summary reasoning – the Court recently reiterated in Talmane (cited above, § 29) that

> "... courts of cassation comply with their obligation to provide sufficient reasoning when they base themselves on a specific legal provision, without further reasoning, in dismissing cassation appeals which do not have any prospects of success (see *Sale v. France*, no. 39765/04, § 17, 21 March 2006, and *Burg and Others v. France* (dec.), no. 34763/02, ECHR 2003-II; for the same approach with regard to constitutional court practice, see *Wildgruber v. Germany* (dec.), no. 32817/02, 16 October 2006). ..."

The Court went on to find that, as regards national courts against whose decisions there is no judicial remedy under national law (such as the Supreme Court in the instant case), this second line of case-law was in line with the principles set out in *Dhahbi* (cited above). Significantly, it observed that the CJEU itself has ruled that the domestic courts referred to in the third paragraph of Article 267 of the TFEU are not obliged to refer a question regarding the interpretation of EU law if the question is not relevant, that is to say, if the answer to that question, whatever it may be, cannot have any effect on the outcome of the case. It is also of significance that the Court gave weight to the Supreme Court's subsequent clarification of its practice regarding the application of sections 80a and 81(1) of the Judiciary (Organisation) Act when it comes to requests for a preliminary ruling. It observed (paragraph 48) as follows.

> "Taking into account the Supreme Court's explanation that it is inherent in a judgment in which the appeal in cassation is declared inadmissible or dismissed by application of and with reference to sections 80a or 81 of the Judiciary (Organisation) Act that there is no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined ..., the Court furthermore accepts that the summary reasoning contained in such a judgment implies an acknowledgment that a referral to the CJEU could not lead to a different outcome in the case."

The Court concluded that, in the context of accelerated procedures within the meaning of sections 80a or 81 of the Judiciary (Organisation) Act, no issue of principle arises under Article 6 § 1 of the Convention when an appeal in cassation which includes a request for referral is declared inadmissible or dismissed with a summary reasoning where it is clear from the circumstances of the case – as in the instant case – that the decision is neither arbitrary nor otherwise manifestly unreasonable.

Presumption of innocence (Article 6 § 2)

G.I.E.M. S.r.l. and Others v. Italy[73] concerned the confiscation of property in the absence of a criminal conviction.

The applicants are companies incorporated under Italian law and an Italian citizen, Mr Gironda. Court orders, confiscating their land and buildings, were issued against them on the ground of unlawful development of their land. However, no criminal proceedings for unlawful development had been issued against the directors of G.I.E.M. S.r.l., the other applicant companies had not been parties to the criminal proceedings against their directors and, although Mr Gironda had been a defendant in criminal proceedings, that action had been discontinued as time-barred. Mr Gironda alleged, in particular, a violation of Article 6 § 2 due to the fact that his property had been confiscated without him having been convicted.

The Grand Chamber found a violation of Article 6 § 2 as regards Mr Gironda.

Although the proceedings against Mr Gironda had been discontinued as statute-barred, all elements of the offence of unlawful site development had been confirmed by the Court of Cassation. Since Article 6 § 2 protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been

73. *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018. See also under Article 7 of the Convention (No punishment without law) and Article 1 of Protocol No. 1 (Enjoyment of possessions) below.

discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged (*Allen v. the United Kingdom*[74]), the declaration of guilt in substance by the Court of Cassation, when the prosecution was already time-barred, was found to have breached Mr Gironda's right to be presumed innocent and thus Article 6 § 2 of the Convention. It is interesting to note that the declaration by the Court of Cassation led to no breach of the principle of legality under Article 7.

Defence rights (Article 6 § 3)

Defence through legal assistance (Article 6 § 3 (c))[75]

Correia de Matos v. Portugal[76] concerned the right of an accused with legal training to represent himself in person and the differing positions of the Court and the UN Human Rights Committee (HRC) on the question.

The applicant, a lawyer by training, was convicted in 1998 for insulting a judge. According to Portuguese law, it is obligatory for an accused (in criminal proceedings) to be represented by counsel, regardless of his legal training (the applicant, a lawyer by profession, had already been suspended from the Bar Council roll). Relying on Article 6 §§ 1 and 3 (c), he applied to this Court, complaining of not being able to conduct his own defence and that he had been assigned a lawyer to represent him against his will. The Court found the application inadmissible as manifestly ill-founded. His subsequent communication to the HRC, on the same facts and complaints, led to a finding that there had been a failure to observe Article 14 § 3 (d) of the International Covenant on Civil and Political Rights[77], views reiterated in the later HRC General Comment No. 32 (23 August 2007, UN Doc. CCPR/C/GC/32, paragraph 37) and Concluding Observations on the fourth periodic report of Portugal (23 November 2012, UN Doc. CCPR/C/PRT/CO/4, paragraph 14), the latter recommending that the rule of mandatory representation be less rigid. Portuguese law was not amended.

The present application concerns similar facts and the same complaints. The applicant was again convicted for insulting a judge, he was refused leave to conduct his own defence and he was defended by a lawyer assigned to him. He again complained under Article 6 § 3 (c)

74. *Allen v. the United Kingdom* [GC], no. 25424/09, § 127, ECHR 2013.

75. See also, under Article 6 § 3 (e) (Free assistance of interpreter), *Vizgirda v. Slovenia*, no. 59868/08, 28 August 2018.

76. *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.

77. International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR).

that, despite his legal training, he could not represent himself. The Grand Chamber concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

The case is noteworthy in two respects. In the first place, it reaffirms the Court's case-law on the scope of the right to represent oneself in criminal proceedings. Secondly, it addresses the basis on which that position was maintained even though State and international practice would appear to have taken another direction.

(i) The judgment contains a comprehensive review of the Court's case-law under Article 6 as regards mandatory legal assistance in criminal proceedings. The Grand Chamber pointed out that the decision in this respect falls within the traditional margin of appreciation of States, who are considered to be better placed than the Court to choose the appropriate means by which to enable their judicial systems to guarantee the rights of the defence. It emphasised that the rights guaranteed by Article 6 § 3 are not ends in themselves: rather their intrinsic aim is to contribute to ensuring the fairness of the criminal proceedings as a whole (*Ibrahim and Others v. the United Kingdom*[78]). The relevant test by which to examine compliance of mandatory legal assistance in criminal proceedings with Article 6 §§ 1 and 3 (c) was therefore summed up as follows.

> "143. the following principles have to be applied: (a) Article 6 §§ 1 and 3 (c) does not necessarily give the accused the right to decide himself in what manner his defence should be assured; (b) the decision as to which of the two alternatives mentioned in that provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends, in principle, upon the applicable domestic legislation or rules of court; (c) member States enjoy a margin of appreciation as regards this choice, albeit one which is not unlimited. In the light of these principles, the Court has to examine, firstly, whether relevant and sufficient grounds were provided for the legislative choice applied in the case at hand. Secondly, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of the fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient grounds for their decisions. In the latter connection,

78. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016.

it will be relevant to assess whether an accused was afforded scope in practice to participate effectively in his or her trial."

The Grand Chamber went on to apply that test to the facts of the present case. Having regard to the procedural context as a whole in which the requirement of mandatory representation was applied (notably, the possibilities remaining open to an accused to intervene in person in the proceedings) and bearing in mind the margin of appreciation enjoyed by the State, the reasons for the impugned choice of the Portuguese legislature were considered to be both relevant and sufficient. Since, in addition, there was no basis on which to find that the criminal proceedings against the applicant had been unfair, the Grand Chamber concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

(ii) Secondly, in examining any factors which could limit a State's margin of appreciation, the Grand Chamber had regard to State practice as well as to developments in international and, where relevant, EU law.

It is interesting to note that the State and international practice examined did not lean in favour of mandatory legal assistance. In the first place, the Court's comparative study revealed a tendency amongst States to recognise the right of an accused to defend himself or herself in person without the assistance of a registered lawyer (of the thirty-five States reviewed, thirty-one had established the right to conduct one's own defence as a general rule, with four States prohibiting, as a general rule, self-representation). Secondly, the case-law of the Court to date and of the HRC differed. At the same time, the Grand Chamber reiterated that the Convention had to be interpreted as far as possible in harmony with other rules of international law; it accepted that when interpreting the Convention it had had regard on a number of occasions to the views of the HRC and its interpretation of the ICCPR; it noted that the relevant provisions of the Convention and the ICCPR were almost identical; and the Grand Chamber acknowledged that the facts of the present case and of its prior communication to the HRC were virtually identical. Thirdly, the terms of the Charter of Fundamental Rights of the European Union, its explanatory notes and Directive 2013/48/EU[79] suggested that the relevant rights in the Charter corresponded to those in Article 6 §§ 1, 2 and 3 of the Convention. The Directive appeared to leave the

79. Directive 2013/48/EU of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 22 October 2013.

choice regarding whether or not to opt for a system of mandatory legal representation to individual member States.

Nevertheless, this State and international practice was not considered by the Grand Chamber to be determinative. The Grand Chamber relied on the considerable freedom in the choice of means which the Court's well-established case-law had conferred on States to ensure that their judicial systems complied with the requirements of the rights guaranteed by Article 6 § 3 (c) and on the fact that the intrinsic aim of that provision is the fairness of the criminal proceedings as a whole. While the Court observed that an absolute bar on the right to defend oneself in person in criminal proceedings without the assistance of counsel might, under certain circumstances, be excessive and while there might be a "tendency" amongst the Contracting Parties to recognise the right of an accused to defend himself or herself without the assistance of a registered lawyer, there was no consensus as such and even national legislations which provided for such a right varied considerably as to when and how they do so.

In *Beuze v. Belgium*[80] the Court examined the statutory (general and mandatory) restriction on a suspect's access to a lawyer under Article 6 §§ 1 and 3 (c).

Having been surrendered to the custody of the Belgian police (European Arrest Warrant), the applicant was later convicted and sentenced for murder. From his surrender to his indictment, he was interviewed by the police five times, three times by the investigating judge and twice by the Crown Prosecutor, and he participated in a reconstruction of the crime scene, each time without a lawyer. He complained under Article 6 §§ 1 and 3 (c) that, by virtue of the law in force at the time (i) he could not communicate with a lawyer until after he had been formally charged and remanded in custody and, thus, after his first interview with the police, and he had not been given sufficient information about his right to remain silent and his right not to be compelled to incriminate himself; and (ii) while he could thereafter consult with his lawyer, the lawyer was not allowed to attend subsequent interviews with the police or investigating judge or to assist in other investigative acts during the judicial investigation.

The Grand Chamber concluded that there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention. The general and mandatory restriction on the right of access to a lawyer flowing from the law in force at the time could not amount to a compelling reason so that the overall

80. *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

fairness of the proceedings had to be strictly scrutinised. In this respect, the Grand Chamber considered that the criminal proceedings against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage.

(i) The judgment in *Ibrahim and Others v. the United Kingdom*[81] confirmed and clarified a two-stage method for testing compliance with Article 6 §§ 1 and 3 (c) of restrictions on access to a lawyer: were there compelling reasons for the restriction and, if not, were the proceedings as a whole fair when strictly scrutinised. The principal issue before the Grand Chamber in the present case was whether this two-stage test also applied to cases, such as this one, where the restriction on the right to legal assistance was general and mandatory (statutory). In other words, did a statutory restriction amount to an automatic violation of the Convention or was the two-stage test to be applied to this statutory and indeed to any type of restriction on the right of access to a lawyer. The Grand Chamber confirmed the latter option to be the correct one.

In particular, the Court had applied the two-stage test in *Salduz v. Turkey*[82]: a statutory restriction was in issue, it was considered that it could not constitute a compelling reason and the Chamber proceeded to analyse the consequences of that restriction in terms of overall fairness. Subsequently, this two-stage *Salduz* approach was applied in the majority of cases, whether they concerned statutory restrictions of a general and mandatory nature or restrictions stemming from case-specific decisions taken by the competent authorities. It was true that certain judgments against Turkey had found that a systemic restriction meant an automatic breach of the Convention without it being necessary to apply the two-stage test (see, in particular, *Dayanan v. Turkey*[83]). However, the Grand Chamber found that that divergence had indeed been resolved by *Ibrahim and Others*, cited above: it confirmed therefore the applicability of the two-stage test (as described above) to any type of restriction (general or individual) on the right of a suspect to have access to a lawyer.

(ii) Secondly, the judgment provided the Grand Chamber with the opportunity to clarify, in concrete terms, the content of the right of access to a lawyer and legal assistance.

Having reiterated in some detail the aim pursued by the right of access to a lawyer, the Grand Chamber set down two minimum requirements of this right. In the first place, suspects must be able to contact a lawyer

81. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

82. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

83. *Dayanan v. Turkey*, no. 7377/03, 13 October 2009.

from the time they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview and even where there is no interview. The lawyer must be able to confer with his or her client in private and receive confidential instructions. Secondly, suspects have the right to have their lawyer physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings. Moreover, such physical presence must enable the lawyer "to provide assistance that is effective and practical rather than merely abstract" and, in particular, to ensure that the defence rights of the interviewed suspect are not prejudiced.

Although not part of the minimum requirements of the right, the Grand Chamber went on to note other forms of restriction on access to a lawyer which could, depending on the specific circumstances of each case and the legal system concerned, undermine the fairness of the proceedings: a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation; and the non-participation of a lawyer in investigative measures such as identity parades or reconstructions. In addition, in determining whether access to a lawyer during the pre-trial phase had been practical and effective, the Grand Chamber also noted that account had to be taken, on a case-by-case basis in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention.

(iii) Thirdly, in examining the fairness of the proceedings as a whole (including the non-exhaustive list of factors to be taken into account in this regard set out in *Ibrahim and Others*, cited above), it is interesting to note that the Grand Chamber reiterated the relatively broad definition of what is to be understood by "self-incriminating" statements. The privilege against self-incrimination was not confined to actual confessions or to remarks which were directly incriminating: for statements to be regarded as self-incriminating it was "sufficient for them to have substantially affected the accused's position" (referring to *Schmid-Laffer v. Switzerland*[84], and *A.T. v. Luxembourg*[85]; see also *Saunders v. the United Kingdom*[86]). In the present case, the applicant had never confessed to the charges and did not incriminate himself *stricto sensu*.

84. *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015.

85. *A.T. v. Luxembourg*, no. 30460/13, § 72, 9 April 2015.

86. *Saunders v. the United Kingdom*, 17 December 1996, § 71, *Reports of Judgments and Decisions* 1996-VI.

However, he had given detailed statements to the investigators which the Court considered influenced their line of questioning, impacted on the investigators' suspicions and undermined his credibility (he had changed his version of the facts several times). Reiterating that very strict scrutiny was called for where there were no compelling reasons to justify the restriction in issue, the Court found that significant weight had to be attached to these factors in its assessment of the overall fairness of the proceedings.

(iv) Finally, as regards the obligation to notify a suspect of his rights, the Grand Chamber confirmed that, while there was "in principle no justification" for a failure to notify a suspect of his or her right to a lawyer, of the privilege against self-incrimination and of his or her right to remain silent, the Court must nevertheless examine whether the proceedings as a whole were fair. However, it clarified that, where this notification had not taken place and where access to a lawyer was delayed, the need for this notification took on a particular importance so that the failure to notify would therefore render it "even more difficult for the Government to show that the proceedings were as a whole fair". In the present case, the fact that the applicant had been informed that his statements could be used in evidence did not amount to sufficiently clear information so as to guarantee his right to remain silent and not to incriminate himself in the absence of his lawyer.

Examination of witnesses (Article 6 § 3 (d))

In *Murtazaliyeva v. Russia*[87] the Grand Chamber clarified the relevant principles for assessing a domestic court's refusal to call a witness requested by the defence.

The applicant is an ethnic Chechen. Shortly after her arrival in Moscow from Chechnya, she was befriended by a police officer, A. The latter found a flat for her, which she shared with two other young women, both converts to Islam. The flat, which belonged to the local police department, had been fitted out with secret audio- and video-recording devices. The following month, the applicant was brought to a police station after an identity check revealed that the official registration of her stay in Moscow had expired. Her handbag was searched by police officers in the presence of two attesting witnesses, B. and K. and was found to contain explosives. The applicant was subsequently charged with terrorism-related offences. Police officer A. made pre-trial statements. The applicant's lawyers requested at the trial that A. be called for examination. Informed by the presiding judge that

87. *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018.

A. was unavailable, the lawyers agreed to the reading-out of his pre-trial statements. The defence's request to call the two attesting witnesses in support of its claim that the police had planted the explosives prior to the applicant's search was dismissed. In the appeal proceedings, the Supreme Court observed that the presence of the attesting witnesses had not been necessary since the applicant herself had claimed that the explosives had been planted in her bag before she was searched. The applicant was convicted as charged. The court had regard to, among other matters, the statements of several prosecution witnesses, the testimony of the applicant's flatmates, incriminating materials found at her flat, forensic-examination reports and the transcripts of the police surveillance videotapes of the flat.

In the Convention proceedings, the applicant complained that the failure to summon police officer A. and the two attesting witnesses for examination breached Article 6 §§ 1 and 3 (d) of the Convention.

Interestingly, the Grand Chamber, unlike the Chamber, accepted the Government's plea that the applicant had waived her right to examine police officer A. The case gave the Grand Chamber the opportunity to restate and apply its well-established case-law on the notion of waiver in the context of the right to examine a witness. Whether the requirements of a valid waiver have been complied with is essentially a question to be resolved on the facts. In the applicant's case, the Grand Chamber made the following, non-exhaustive, findings: the applicant's defence lawyers had unequivocally agreed to the reading-out of A.'s statement; they did not insist that A. be heard, although this possibility was available to them under domestic law; they chose not to revert to the matter in the appeal proceedings; and they must be taken to have been aware that by agreeing to the reading-out of A.'s statements they would lose the possibility to have him heard and that his statements would be taken into consideration by the court.

The Grand Chamber declared the applicant's complaint inadmissible as being manifestly ill-founded. Although the Chamber had dealt with this complaint on the merits, and found no violation, the applicant's case is a good illustration of the fact that the Grand Chamber may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons set out in the first three paragraphs of Article 35 of the Convention.

The Grand Chamber's treatment of the domestic courts' refusal of the applicant's request to summon B. and K. (the attesting witnesses) is of greater jurisprudential significance. It clarified the principles to be applied to the calling and examining of defence witnesses within the meaning of Article 6 § 3 (d) of the Convention. The judgment in *Perna v.*

Italy[88] has been seen as a key point of reference for assessing whether the refusal to summon a witness for the defence has complied with the requirements of Article 6 § 3 (d). According to the compliance test set out in paragraph 29 of *Perna*, two questions have to be addressed: whether the applicant has substantiated his or her request to call a particular witness by referring to the relevance of that individual's testimony for "the establishment of the truth" and, secondly, whether the domestic courts' refusal to call that witness undermined the overall fairness of the proceedings. Significantly, the Grand Chamber's review of the pre- and post-*Perna* case-law revealed that the Court has also consistently examined, and considered as a weighty factor, the manner in which the domestic courts ruled on a request by the defence to call a witness and, importantly, whether they considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial. It is noteworthy that the Grand Chamber decided in the instant case to bring that requirement to the fore, being of the opinion that it was in fact an implicit and integral component of the test and a logical link between the two limbs of that test, which thus becomes a three-pronged test (paragraph 158):

> "1. Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation.
>
> 2. Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial.
>
> 3. Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings."

Importantly, the Grand Chamber provided guidance for the examination of future cases in the light of its clarification of the applicable principles. A number of points are worth highlighting.

Regarding the first step, the Grand Chamber noted that under the *Perna* test the issue of whether an accused substantiated his or her request to call a witness on his or her behalf is decided by reference to the relevance of that individual's testimony for "the establishment of the truth". However, in view of the post-*Perna* case-law, it considered that it was "necessary to clarify the standard by bringing within its scope not only motions of the defence to call witnesses capable of influencing

88. *Perna v. Italy* [GC], no. 48898/99, ECHR 2003-V.

the outcome of a trial, but also other witnesses who can reasonably be expected to strengthen the position of the defence" (paragraph 160).

Regarding the second step, the Grand Chamber observed that "the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence's request to examine a witness" (paragraph 166).

Regarding the third step, the Grand Chamber considered that "[w]hile the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion" (paragraph 168).

On the facts of the applicant's case, the Grand Chamber observed, among other things, in relation to each of the three-steps: (i) the defence gave little more than a brief indication of the relevance of B.'s and K.'s potential testimony; its request to summon them did not contain any particular factual or legal arguments and did not elaborate in concrete terms on how their testimony would assist the defence's case; (ii) having regard to the general passivity of the defence during the examination of the police officers about the events surrounding the alleged planting of the explosives, and the absence of any specific legal or factual arguments as to the necessity of examining the attesting witnesses, the reasons given by the Supreme Court were appropriate in the circumstances of the case and were commensurate with the reasons advanced by the defence; and (iii) there was a considerable body of incriminating evidence against the applicant which she was able to challenge effectively with the benefit of legal representation. The overall fairness of the proceedings had not been undermined.

The Grand Chamber concluded by finding that there had been no breach of Article 6 §§ 1 and 3 (d).

Free assistance of interpreter (Article 6 § 3 (e))

In the *Vizgirda v. Slovenia*[89] judgment, the Court examined the scope of the rights guaranteed by Article 6 § 3 (a) and (e) and, in particular, the duty to verify the language needs of foreign defendants.

The applicant is a Lithuanian national. He was arrested on suspicion of having robbed a bank in Slovenia shortly after his arrival in the country. Following his arrest, he was provided with interpretation into Russian, which is not his native language. The services of the interpreter continued during the investigation phase and trial as well as during

89. *Vizgirda v. Slovenia*, no. 59868/08, 28 August 2018.

his appeal against conviction. The applicant was at all times legally represented, and was assisted by the interpreter when communicating with his lawyer. It was only at the time of his appeal on a point of law and later in his constitutional complaint proceedings that the applicant mentioned that his trial had been unfair because of the difficulties he had experienced in following the proceedings in the Russian language. The complaint was dismissed.

In the Convention proceedings the applicant essentially complained that he was unable to defend himself effectively during the criminal trial because the oral proceedings and the relevant documents were not translated into Lithuanian, his native language, but only into Russian, a language which he had considerable difficulties in understanding. The Court ruled in favour of the applicant and found a breach of Article 6 §§ 1 and 3 of the Convention.

The applicant's case gave the Court the opportunity to review and develop its previous case-law on the scope of the rights guaranteed by Article 6 § 3 (a) and (e) of the Convention to foreign defendants like the applicant and the nature of the corresponding obligations on the national authorities in this area. Importantly, the Court had regard to other developments in its jurisprudence on the notion of a fair trial in general and referred to relevant instruments adopted by the European Union, notably Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings ("the Directive on Interpretation") and Directive 2012/13/EU on the right to information in criminal proceedings ("the Right to Information Directive" – for the relevant parts of these Directives, see paragraphs 51-61 of the judgment).

Reviewing precedent in this area (see, among other authorities, *Hermi v. Italy*[90]; *Brozicek v. Italy*[91]; *Kamasinski v. Austria*[92]; *Cuscani v. the United Kingdom*[93]; and *Diallo v. Sweden*[94]), the Court noted, among others, the following principles:

(i) an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial;

90. *Hermi v. Italy* [GC], no. 18114/02, ECHR 2006-XII.
91. *Brozicek v. Italy*, 19 December 1989, Series A no. 167.
92. *Kamasinski v. Austria*, 19 December 1989, Series A no. 168.
93. *Cuscani v. the United Kingdom*, no. 32771/96, 24 September 2002.
94. *Diallo v. Sweden* (dec.), no. 13205/07, 5 January 2010.

(ii) it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether the fairness of the trial requires, or has required, the appointment of an interpreter to assist the defendant.

The Court further observed (paragraph 81) with regard to the duty to verify or assess a defendant's linguistic competency that

> "... this duty is not confined to situations where the foreign defendant makes an explicit request for interpretation. In view of the prominent place held in a democratic society by the right to a fair trial ..., it arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. *It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made.*"

Interestingly the Court subsequently noted (paragraph 83) in this connection that

> "... the fact that the defendant has a basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to exercise fully his or her right to defence."

It is particularly noteworthy that the Court stressed the importance of:

(i) notifying the suspect, in a language he understands, of his right to interpretation when "charged with a criminal offence" (see, *mutatis mutandis*, *Dvorski v. Croatia*[95]; *Ibrahim and Others v. the United Kingdom*[96]; and Article 3 of the Right to Information Directive) and to note in the record that the suspect has been duly notified;

(ii) noting in the record any procedure used and decision taken with regard to the verification of the suspect's interpretation needs, as well as the assistance provided by the interpreter.

The main question for the Court in the instant case was whether the applicant was provided with interpretation in a language of which he

95. *Dvorski v. Croatia* [GC], no. 25703/11, § 101, ECHR 2015.

96. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 272, 13 September 2016.

had a sufficient command for the purposes of his defence and, if not, whether this undermined the fairness of the proceedings as a whole. It found that the Convention had been breached essentially because the Slovenian authorities had operated on the assumption that the applicant could follow the proceedings in Russian. They had not verified his linguistic competence in that language and he had never been consulted on the matter. Although the applicant appeared to have been able to speak and understand some Russian, a fact which he did not deny, the Court did not find it established on the facts that his competency in that language was sufficient to safeguard the fairness of the proceedings.

The judgment is of further interest in view of the Court's answer to the Government's objection that the applicant had belatedly complained of being linguistically handicapped during the investigation and trial and had failed to draw attention to his predicament at the appropriate stage of the proceedings. It was important for the Court that there was no indication in the file that the authorities had informed the applicant of his right to interpretation in his native language or of his basic right to interpretation into a language he understood. Among other considerations it noted that under domestic law the applicant was entitled to interpretation in his native language and the authorities were obliged, under domestic procedural law, to inform him of that right and to make a record of such a notification and of the applicant's response to it.

Other rights in criminal proceedings

No punishment without law (Article 7)

G.I.E.M. S.r.l. and Others v. Italy[97] concerned the confiscation of property in the absence of a criminal conviction and the principle of legality.

The applicants are companies incorporated under Italian law and an Italian citizen, Mr Gironda. Court orders, confiscating their land and buildings, were issued against them on the ground of unlawful development of their land. However, no criminal proceedings for unlawful development had been issued against the directors of G.I.E.M. S.r.l., the other applicant companies had not been parties to the criminal proceedings against their directors and, although Mr Gironda had been a defendant in criminal proceedings, that action had been

97. *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018. See also under Article 6 § 2 of the Convention (Presumption of innocence) above and Article 1 of Protocol No. 1 (Enjoyment of possessions) below.

discontinued as time-barred. The applicants relied on Article 7 of the Convention.

The Grand Chamber found, *inter alia*, no violation of Article 7 as regards Mr Gironda and a violation of Article 7 as regards the applicant companies.

This judgment mainly concerns the principle of legality in criminal law enshrined in Article 7 and, in particular, an important consequence of that principle, namely, the prohibition on punishing a person where the offence has been committed by another. The case-law significance of this judgment lies in the extent to which it confirms and clarifies the *Sud Fondi S.r.l. and Others v. Italy*[98] case-law, as well as the later judgment in *Varvara v. Italy*[99].

Prior to *Sud Fondi S.r.l. and Others*, the administrative authorities confiscated property developed in breach of planning laws, the stated aim being an administrative restoration of legality rather than punishment. In *Sud Fondi S.r.l. and Others* the directors of the applicant company had been acquitted but a confiscation order was nevertheless made against the company. In finding a breach of Article 7, the Court found the confiscation to be a criminal sanction so that Article 7 therefore applied. Article 7 required "an intellectual link" disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty (confiscation) was unjustified[100]. In the later *Varvara* case, the Court found that, since the confiscation had been ordered despite the fact that the criminal offence was time-barred and the applicant's "criminal liability had not been established in a verdict as to his guilt", there had been a breach of the principle of legality laid down in Article 7 (cited above, § 72). Questions then arose before the domestic courts as to the meaning of this Convention case-law, and notably whether the *Varvara* judgment had conditioned confiscations on prior convictions by the criminal courts. The present judgment brings clarity on this and other issues.

(i) In confirming that the confiscation amounted to a penalty, the Grand Chamber reiterated the criteria by which this assessment was to be made: whether the measure is imposed following a decision that

98. *Sud Fondi S.r.l and Others v. Italy* (dec.), no. 75909/01, 30 August 2007, and *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009.

99. *Varvara v. Italy*, no. 17475/09, 29 October 2013.

100. In response to the *Sud Fondi S.r.l. and Others* judgment, the domestic courts altered their case-law: to implement a confiscation measure where the prosecution had become statute-barred, it had to be demonstrated that the offence (material and mental element) had nevertheless been made out and the domestic courts refrained from imposing confiscation on *bona fide* third parties.

a person is guilty of a criminal offence; the nature and purpose of the measure in question; its characterisation under national law; and the procedures involved in the making and implementation of the measure. Importantly, the first criterion was, the Grand Chamber confirmed, merely one of many and not a decisive one and, in any event, it agreed with the finding in the decision in *Sud Fondi S.r.l. and Others* that the confiscation was connected to a criminal offence based on general legal provisions. Article 7 was therefore applicable.

(ii) On the merits of the Article 7 complaint, the Grand Chamber confirmed that Article 7 precluded any decision to impose those measures on the applicants "in the absence of a mental link disclosing an element of liability in their conduct", thus sharing the view in the judgment in *Sud Fondi S.r.l. and Others* (cited above, §§ 111-16).

As to whether this "mental link" was fulfilled when none of the applicants had been *formally convicted*, the Grand Chamber clarified the meaning of the *Varvara* judgment (cited above, §§ 71-72). While (as indicated in *Varvara*) the requisite declaration of criminal liability is often made in a criminal-court judgment formally convicting the defendant, this was not mandatory. The *Varvara* judgment did not mean that confiscation measures for unlawful site development had to be accompanied by convictions by the criminal courts. In that sense, Article 7 did not impose the "criminalisation" by States of procedures which, in exercising their discretion, they had not classified as falling strictly within the criminal law, the Grand Chamber finding support for this in its established case-law to the effect that Article 6 did not preclude a "penalty" being imposed by an administrative authority in the first instance (for example, *Öztürk v. Germany*[101], and *Mamidakis v. Greece*[102]). In short, the "mental element" did not require formal criminal convictions.

However, Article 7 required at least a *formal declaration of criminal liability* in respect of those being punished (the applicants). As to the applicant companies, no proceedings had been taken against them so there had been no such declaration of their liability. The Grand Chamber refused to lift the corporate veil and confirmed that the legal personality of the companies is distinct from that of their directors. Since the principle of legality prohibits the punishment of one party (the applicant companies) for the commission of an act engaging the criminal liability of another party (their directors), the confiscation of the applicant companies' property violated Article 7 of the Convention.

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101. *Öztürk v. Germany*, 21 February 1984, §§ 49 and 56, Series A no. 73.

102. *Mamidakis v. Greece*, no. 35533/04, § 33, 11 January 2007.

As to Mr Gironda, although the proceedings against him had been discontinued as statute-barred, all elements of the offence of unlawful site development had been confirmed by the Court of Cassation. Those findings could be regarded as amounting, in substance, to a conviction for the purposes of Article 7, in which case his rights under Article 7 had not been breached. It is interesting to note that the declaration by the Court of Cassation led to no breach of the principle of legality under Article 7 and, at the same time, it was found to breach his right to be presumed innocent guaranteed by Article 6 § 2 of the Convention.

OTHER RIGHTS AND FREEDOMS

Right to respect for one's private and family life, home and correspondence (Article 8)

Private life

Denisov v. Ukraine[103] concerned the notion of private life in the context of employment disputes.

The applicant was dismissed from the position of President of the Kyiv Administrative Court of Appeal on the basis of a failure to perform his administrative duties properly. He remained as a judge in the same court. He complained under Article 8 of a violation of his right to respect for his private life.

The novel aspect of this judgment concerns the applicability of Article 8 and, in particular, whether the applicant's dismissal as President while retaining his position as a judge fell within the scope of the right to respect for "private life", it being noted that Article 8 had been found to be applicable in a relatively recent and similar context (*Erményi v. Hungary*[104]).

A number of points are noteworthy.

(i) A divergent practice in dealing with the scope of "private life" on admissibility and merits was noted, which the Grand Chamber considered could not be justified. It confirmed the following strict approach:

> "As the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the general rule of dealing with applications should be respected and the relevant analysis should be carried

103. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) and Article 8 (Private life) above.
104. *Erményi v. Hungary*, no. 22254/14, 22 November 2016.

> out at the admissibility stage unless there is a particular reason to join this question to the merits."

(ii) Based on a thorough review of relevant case-law, the Grand Chamber set down the principles by which to assess whether employment disputes fall within the scope of "private life", which it summarised as follows.

> "115. The Court concludes from the above case-law that employment-related disputes are not *per se* excluded from the scope of 'private life' within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's 'inner circle', (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach).
>
> 116. If the consequence-based approach is at stake, the *threshold of severity* with respect to all the above-mentioned aspects *assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case*. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these *consequences are very serious and affect his or her private life to a very significant degree*.
>
> 117. The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. The Court further considers that in determining the seriousness of the consequences in employment-related cases it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure. Having regard to the

> rule of exhaustion of domestic remedies, the essential elements of such allegations must be sufficiently raised before the domestic authorities dealing with the matter." (Emphasis added.)

In sum, the Court defined those aspects of private life (inner circle, outer circle, reputation) relevant to employment disputes. In addition, since the *reasons* for the applicant's dismissal did not concern his private life (but rather his performance in a public arena), this was a case concerning the alleged *consequences* of a dismissal on private life: the burden and standard of proof (in italics above) were developed therefore by the Grand Chamber as regards the impugned consequences of a dismissal. On the facts, the Court found that the applicant had not demonstrated that the consequences affected the relevant three aspects of his private life, so that his complaint under Article 8 was incompatible *ratione materiae*.

(iii) The reasoning on the applicant's "professional and social reputation" is interesting, the core question being whether his dismissal encroached upon his reputation in such a way that "it seriously affected his esteem among others, with the result that it ha[d] a serious impact on his interaction with society". His dismissal as President could not be considered to have affected the core of his "professional reputation": he retained his position as a judge; he had been dismissed as President only on the basis of his lack of managerial skills (contrast the criticism of the applicant in *Oleksandr Volkov v. Ukraine*[105]); and, while he may have been at the apex of his legal career, he had not specified how this loss of esteem had "caused him serious prejudice in his professional environment" (namely, his future career as a judge). As regards his "social reputation" it was important that his dismissal for the above-noted reason did not concern a wider moral/ethical aspect of his personality and character (contrast *Lekavičienė v. Lithuania*[106], and *Jankauskas v. Lithuania (no. 2)*[107]).

Anchev v. Bulgaria[108] concerned the exposure of individuals on account of their affiliation to the former security services during the communist regime.

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105. *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013.

106. *Lekavičienė v. Lithuania*, no. 48427/09, 27 June 2017.

107. *Jankauskas v. Lithuania (no. 2)*, no. 50446/09, 27 June 2017.

108. *Anchev v. Bulgaria* (dec.), nos. 38334/08 and 68242/16, 5 December 2017, made public on 11 January 2018.

The applicant held a number of government and other important positions in post-communist Bulgaria which resulted in the application to him of the 2006 Law on access to and disclosure of documents and exposure of the affiliation of Bulgarian citizens to State Security and the intelligence services of the Bulgarian People's Army. Pursuant to that Law an independent Commission tasked with its implementation conducted a series of investigations into the applicant's possible affiliation to the security services managed by State Security under the former communist regime. The Commission took three separate decisions in respect of the applicant, on each occasion ordering his exposure on the basis of information about him found in the State Security records which had survived their partial and covert destruction shortly after the fall of the communist regime in 1989. Exposure entailed the publication of the Commission's findings. The Act did not provide for sanctions or any legal disabilities such as disenfranchisement or disbarment from holding official office or engaging in public or private professional activities. The applicant twice challenged the lawfulness of the Commission's decisions, arguing that the material relied on to expose him did not clearly prove that he had been a collaborator. The domestic courts ultimately ruled that the Commission did not have to check whether the applicant had in fact collaborated or consented to being a collaborator since it had found State Security records relating to his involvement in its work. That of itself was sufficient to give rise to exposure.

The applicant complained before the Court that the exposure decisions had breached his right to respect for his private life under Article 8 of the Convention. The applicant contended in particular that the exposure scheme did not provide for an individual assessment of the reliability of the evidence available with respect to each person featuring as a collaborator in the surviving records of the former security services, or of his or her precise role, instead requiring the exposure of any such person.

The Court declared the complaint inadmissible as being manifestly ill-founded. The decision is of interest in view of its treatment of the necessity of the interference, and in particular the manner in which the Court compared and contrasted the exposure scheme with the lustration approach adopted by other States in a similar context.

The Court observed that the key issue was to determine whether, in adopting the exposure scheme under the 2006 Law, the authorities had acted within their margin of appreciation. On that point, it noted that Contracting States which have emerged from undemocratic regimes have a broad margin of appreciation in choosing how to deal with the

legacy of those regimes. This part of the Court's analysis is noteworthy for its comprehensive review of its previous case-law in this area which illustrates the diversity of the approaches which the new democracies have taken with a view to addressing their past.

The Court observed that the Bulgarian Parliament, following much debate and with cross-party support, had ultimately legislated for a system exposing an individual's affiliation with the former security services in preference to the enactment of a lustration law. It noted that the 2006 Law had been declared constitutional by the Constitutional Court following a careful review which took account of the relevant case-law principles, a factor which only served to reinforce Bulgaria's wide margin of appreciation in devising the policy underpinning the 2006 Law.

The Court gave weight to a number of considerations which confirmed that Bulgaria had not exceeded its margin of appreciation including: exposure did not give rise to sanctions or legal disabilities (compare and contrast *Sidabras and Džiautas v. Lithuania*[109]), and it was not certain that exposed persons had been prejudiced as a result in their professional or private life – the applicant has in fact continued to be active in the business world and public life; the Law was only directed at persons who, since the fall of the communist regime, had taken up important functions in the public or private sectors (compare and contrast *Sõro v. Estonia*[110]); the process of exposure was attended by a number of safeguards to prevent arbitrariness or abuse including the right of an individual concerned to have access to the records relied on by the Commission and to seek judicial review of the Commission's decision to expose him or her.

Turning to the applicant's complaint concerning the lack of assessment of individual situations, the Court observed that if all the files of the former security services had survived, it might have been feasible to assess the exact role of each of the individuals mentioned in them. Since many of these files had been covertly destroyed, the Bulgarian legislature had chosen to provide for the exposure of anyone found to feature in any of the surviving records, even if there were no other documents showing that he or she had in fact collaborated. It further noted that, when reviewing that solution, the Constitutional Court had stated that, otherwise, collaborators whose files had survived would unjustifiably have been treated less favourably. In view of the circumstances in which a large number of the files of the former security

109. *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII.
110. *Sõro v. Estonia*, no. 22588/08, 3 September 2015.

services had been destroyed, that had to be seen as a weighty reason for the legislative scheme adopted by Bulgaria.

Hadzhieva v. Bulgaria[111] concerned an applicant minor allegedly left to her own devices following her parents' arrest and detention for thirteen days.

The applicant was 14 years old at the time of the events giving rise to the application. She was alone at home on 4 December 2002 when police officers arrived to arrest her parents with a view to the execution of an extradition request issued in respect of them by Turkmenistan. Her parents were out at the time. They were arrested on their return and taken into custody. The applicant remained alone in the flat. She was reunited with her parents on 17 December 2002 following their release on bail. The applicant was unsuccessful in her claim for compensation for the stress and suffering she endured on account of the alleged failure of the authorities to organise support and care for her during her parents' detention. The court of appeal found that, even if the applicant had been left alone after their arrest, responsibility for that could not be attributed to the police, the prosecuting authorities or the court, given that her mother had stated at a court hearing on 6 December 2002, two days after her arrest, that there had been someone to take care of her.

In the Convention proceedings, the applicant contended that the circumstances of the case disclosed a breach of Article 8. The crucial issue was to determine whether the respondent State had discharged its positive obligations under that Article to secure the protection of the applicant's right to respect for her psychological integrity. Interestingly, the Court agreed with the applicant, but only as regards the two-day period between her parents' arrest and the court hearing on 6 December 2002 during which, according to the record, the applicant's mother had confirmed that the applicant was being cared for. In respect of the remaining period it found that there had been no breach of Article 8.

As regards the two-day period, the Court noted that under domestic law the authorities had the responsibility to either place the applicant's parents in a position to arrange for her care at the time of their being taken into custody, or to enquire into the applicant's situation of their own motion. Once the authorities had established the circumstances relating to her care in her parents' absence, if it appeared necessary, they had an obligation to provide the applicant with assistance, support and

111. *Hadzhieva v. Bulgaria*, no. 45285/12, 1 February 2018.

services as needed, either in her own home, or in a foster family or at a specialised institution. The authorities had failed to comply with their positive obligation under Article 8 to act in order to ensure that the applicant, who was a minor left without parental care, was protected and provided for in her parents' absence.

As to the period between the date of the court hearing and the release of her parents, the Court noted among other things that, in addition to being recorded as stating in court that there was someone to care for her daughter, the applicant's mother did not, at any point in time – either before or after that hearing, at the time of her arrest or later from prison – raise with any authority the question of the applicant's care during her detention. Neither did her father, who had been arrested at the same time and together with the mother, alert any authority at any point in time that his daughter had been left alone or that he had any concerns about her care in his absence. It is noteworthy that the Court gave weight to the fact that the applicant's parents were educated, professional persons and at all times legally represented. In the circumstances, the Court considered that the competent authorities had no reason to assume, or suspect, after the court hearing on 6 December 2002 that the applicant had been left alone and not provided for in her parents' absence. On that account, the fact that the authorities did not act of their own motion to ensure that the applicant's welfare was not at risk did not amount to a breach of their positive obligations under Article 8.

The case is interesting in view of the novelty of the context in which the complaint arose and, as regards the facts alleged, the Court's analysis of the scope of the State's obligation under Article 8 of the Convention.

Libert v. France[112] concerned the opening by a public-sector employer of an applicant employee's files that were stored on the hard disk of his professional computer and marked "personal".

The applicant was employed by the SNCF, the French State railway company. He was suspended from his functions pending the outcome of an internal investigation. During the applicant's absence, his employer analysed the content of the hard disk of his office computer. Files were found containing, among other things, a very considerable number of pornographic pictures and films. The applicant was dismissed. He complained in the domestic proceedings that his employer had breached his right to respect for his private life by opening, in his

112. *Libert v. France*, no. 588/13, 22 February 2018.

absence, a file marked "giggles" stored on the hard disk which he had clearly designated as containing "personal data". The domestic courts rejected his argument, not being persuaded that the description the applicant had given to the hard disk and the name given to the file were sufficient to indicate that the content was private, thereby requiring his presence before the file could be accessed by his employer. The domestic courts further observed in line with previous case-law of the Court of Cassation that an employee could not designate the whole of the hard disk of his or her office computer as "personal" since the hard disk was, by default, for professional use and data files stored on it were presumed to relate to professional activities, unless the employee had clearly indicated that the content was private (the Court of Cassation precedent relied on had referred to "personal" in this connection).

The applicant alleged in the Convention proceedings that the circumstances of his case disclosed an unjustified interference with his right to respect for his private life. The Court found that there had been no breach of Article 8.

The judgment is of interest in that it represents a further contribution to the growing case-law on surveillance at the place of work (see, in this connection, as regards monitoring of telephone and Internet use: *Bărbulescu v. Romania*[113]; *Halford v. the United Kingdom*[114]; *Copland v. the United Kingdom*[115]; and, as regards video surveillance: *Köpke v. Germany*[116]; *Antović and Mirković v. Montenegro*[117]; and *López Ribalda and Others v. Spain*[118]).

The following points may be highlighted.

In the first place, the Court confirmed that information stored on an office computer that had clearly been marked as private was in certain circumstances capable of falling within the notion of "private life", thus attracting the applicability of Article 8. It noted in this connection that the SNCF tolerated the occasional use by its employees of their office computers for private purposes subject to their compliance with the applicable rules.

Secondly, unlike in *Bărbulescu* (cited above), for example, the Court examined the applicant's complaint from the standpoint of an alleged interference by the State with the applicant's Article 8 right. The SNCF was a public-law entity even if it displayed certain features of a

113. *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017 (extracts).

114. *Halford v. the United Kingdom,* 25 June 1997, *Reports of Judgments and Decisions* 1997-III.

115. *Copland v. the United Kingdom*, no. 62617/00, ECHR 2007-I.

116. *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010.

117. *Antović and Mirković v. Montenegro*, no. 70838/13, 28 November 2017.

118. *López Ribalda and Others v. Spain*, nos. 1874/13 and 8567/13, 9 January 2018 (referred to the Grand Chamber).

private-law nature. In *Bărbulescu* the source of the infringement of the applicant's right was a private employer, which meant that the Court had to examine in that case the applicant's complaint from the perspective of the State's compliance with its positive obligation to protect the applicant's right to respect for his private life.

Thirdly, the Court accepted that at the material time it was the settled case-law of the Court of Cassation that any data files created by an employee on his office computer were presumed to be professional in nature unless the employee had clearly and precisely designated such files as "personal". If the employee did so, the files could only be accessed by his employer in the employee's presence or after the latter had been duly invited to be present. The inference in the instant case thus had a lawful basis with adequate safeguards to prevent arbitrariness. The Court reverted to this matter when examining the proportionality of the interference.

Fourthly, the Court acknowledged with reference to the treatment of the legitimate-aim requirement in *Bărbulescu* (§ 127) that an employer had a legitimate interest in ensuring the smooth running of the company, and that this could be done by establishing mechanisms for checking that its employees were performing their professional duties adequately and with the necessary diligence.

Finally, the Court was satisfied that the domestic courts had given relevant and sufficient reasons for the interference (see above) and that safeguards were in place to prevent the employer's arbitrary access to an employee's information that was clearly marked as being private (see, however, in this connection, the Court's finding in *Bărbulescu*). It is interesting to note that the Court did not find it problematic that the Court of Cassation in a previous ruling appeared to accept that the designation of a hard disk or a file as "personal" – which was that used by the applicant – was sufficient to convey the private nature of the content. For the Court, what was significant was that the employer's Charter governing the use of its computer system stressed that private information had to be clearly marked "private".

M.L. and W.W. v. Germany[119] concerned the refusal of the applicants' request to oblige media organisations to anonymise online archive material concerning their criminal trial and conviction.

The applicants were convicted of the murder of a well-known actor. Their trial received a great deal of media attention at the time. While serving their sentences the applicants tried unsuccessfully on several

119. *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, 28 June 2018.

occasions to have their criminal proceedings reopened. Following their release they requested – for reasons related to their social reintegration – a number of media organisations which had reported on their case to anonymise the personal information held on them in their online archives. The Federal Court of Justice ultimately dismissed their challenge of the refusal of the media organisations to comply with their request.

In the Convention proceedings, the applicants contended that that decision had breached their right to respect for their private life guaranteed by Article 8. The Court disagreed.

This is the first occasion on which the Court has been asked to determine whether a domestic court has struck the right balance between the privacy rights of an individual, viewed in terms of his right to protection of his personal data, and the Article 10 right of a media organisation to make available to the public online its historical record of the information which it has already published about that individual.

Firstly, it reaffirmed that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private life (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[120]).

Secondly, turning to Article 10 it reiterated that the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. The maintenance of Internet archives is a critical aspect of this role and such archives fall within the ambit of the protection afforded by Article 10. Regarding press archives it observed in line with its earlier case-law, in particular, *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*[121] (§§ 27 and 45) that

> "... while the primary function of the press in a democracy is to act as a 'public watchdog', it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported. ..."

Interestingly, the Court was careful to distinguish between the circumstances of the instant case – the applicants' request for anonymity was directed at the media organisations which had published the information about them at the time of their trial and then stored it electronically – and cases in which individuals exercise their data-protection rights with respect to their personal information which is published on the Internet and which, by means of search engines, may be accessed and retrieved by third parties and used for profiling

120. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 136-37, 27 June 2017.

121. *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, ECHR 2009.

purposes. The Court observed that, depending on the context, the balancing exercise between the competing Article 8 and Article 10 rights may produce different results when it comes to the assertion of a right to have one's personal data anonymised or erased.

As to whether the Federal Court of Justice struck a fair balance between the competing interests at stake in the applicants' case, it is interesting to note that the Court considered that it could have regard in this context to the non-exhaustive list of considerations it had formulated in its earlier case-law while bearing in mind that certain of these considerations may have less relevance to the circumstances of this case than others (*Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 165, and the case-law referred to therein). It will be recalled that those considerations are: 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; and the content, form and consequences of the publication.

Applying these criteria to the facts of the applicants' case, and having regard to the wide margin of appreciation which domestic courts enjoy in carrying out this exercise, the Court concluded that the Federal Court of Justice's refusal of their request did not amount to a failure to protect their Article 8 rights. The Court noted among other matters the lawful nature of the original reporting on the applicants, the importance of preserving and ensuring the availability of that information and the conduct of the applicants with regard to the media.

Big Brother Watch and Others v. the United Kingdom[122] related to safeguards against arbitrariness and abuse of power in the areas of surveillance and interception of communications and acquisition of communications data.

The applicants complained in the Convention proceedings of the scope and scale of the electronic surveillance programmes operated by the authorities of the respondent State. It was their case that domestic law in this area was incompatible with the Convention since it authorised interferences with their Article 8 privacy rights by making possible, in the absence of appropriate procedures and safeguards: (a) the bulk interception of communications; and (b) intelligence sharing with foreign governments. Furthermore, in their view, the regime

122. *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 13 September 2018 (not final). See also under Article 10 (Freedom of the press) below.

governing the acquisition by the authorities of communications data from Communications Services Providers was equally problematic.

The judgment is important given that the case allowed the Court a fresh opportunity to conduct a very comprehensive review of its jurisprudence on the interception (both targeted and, of particular relevance, bulk interception) of communications and to distil the key principles for reconciling the use of surveillance measures and the protection of privacy in the contexts identified by the applicants (see among the many authorities referred to in paragraphs 303-13 of the judgment, *Roman Zakharov v. Russia*[123]; *Liberty and Others v. the United Kingdom*[124]; *Weber and Saravia v. Germany*[125]; and, most recently, *Centrum för rättvisa v. Sweden*[126]).

(a) Bulk interception of communications

Significantly, the Court affirmed that the requirements set out in its earlier case-law were relevant when it came to assessing the Convention compatibility of enabling legislation for the bulk interception of communications. It observed that such legislation should as a minimum set out: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed. Moreover, it further noted that in addition to these requirements regard would also be had in its compliance-assessment to the arrangements for supervising the implementation of secret-surveillance measures, any notification mechanisms and the remedies provided for by national law (see also *Roman Zakharov*, cited above, § 238).

Importantly, the Court did not accept the applicants' arguments that the above requirements needed to be "updated" in view of the increased sophistication and intrusiveness of surveillance technology by including, for example, a requirement of independent judicial authorisation of interception warrants. While it considered judicial authorisation to be an important safeguard, and perhaps even "best practice", by itself it could neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention. For the Court, what was crucial was to have regard to the actual operation of the system of interception, including the checks

123. *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

124. *Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008.

125. *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI.

126. *Centrum för rättvisa v. Sweden*, no. 35252/08, 19 June 2018 (not final).

and balances on the exercise of power, and the existence or absence of any evidence of actual abuse.

Having regard to the above considerations, the Court conducted a careful and detailed analysis of the applicable domestic-law provisions regulating bulk interception of communications. It concluded (paragraphs 387-88)

> "... that the decision to operate a bulk-interception regime was one which fell within the wide margin of appreciation afforded to the Contracting State. [The Court] is satisfied that the intelligence services of the United Kingdom take their Convention obligations seriously and are not abusing their powers ... Nevertheless, an examination of those powers has identified two principal areas of concern; firstly, the lack of oversight of the entire selection process, including the selection of bearers for interception, the selectors and search criteria for filtering intercepted communications, and the selection of material for examination by an analyst, and, secondly, the absence of any real safeguards applicable to the selection of related communications data for examination."

In view of these two specific shortcomings, the Court found that the relevant regime did not meet the "quality of law" requirement and was incapable of keeping the "interference" to what was "necessary in a democratic society". There had been a violation of Article 8 of the Convention on that account.

(b) Intelligence sharing

The judgment also marks the first occasion on which the Court has addressed the issue of the compliance of an intelligence-sharing regime with Article 8 of the Convention. The applicants claimed that the authorities of the respondent State requested and received intelligence from the intelligence services of the United States of America operating within the framework of the surveillance programmes managed by that country. It is noteworthy that the Court clarified that the interference under consideration did not lie in the interception itself, given that it did not occur within the United Kingdom's jurisdiction, but was carried out under the full control of the US authorities. Rather, the interference lay in the receipt of the intercepted material and its subsequent storage, examination and use by the intelligence services of the respondent State.

It is noteworthy that the Court considered the extent to which the above-mentioned minimum requirements applied to an intelligence-sharing regime. Importantly, it concluded that although the interference in this case was not occasioned by the interception of communications

by the respondent State, the material obtained was nevertheless the product of intercept. Accordingly, those specific requirements which related to its storage, examination, use, onward dissemination, erasure and destruction must be present in the enabling legislation. Of further importance is the Court's conclusion on the application of the first two requirements to an intelligence-sharing regime, namely, the nature of offences which may give rise to an interception order, and the definition of the categories of people liable to have their communications intercepted. It noted the following (paragraph 424).

> "Furthermore, while the first and second of the six requirements may not be of direct relevance where the respondent State is not carrying out the interception itself, the Court is nevertheless mindful of the fact that if Contracting States were to enjoy an unfettered discretion to request either the interception of communications or the conveyance of intercepted communications from non-Contracting States, they could easily circumvent their obligations under the Convention. Consequently, the circumstances in which intercept material can be requested from foreign intelligence services must also be set out in domestic law in order to avoid abuses of power. While the circumstances in which such a request can be made may not be identical to the circumstances in which the State may carry out interception itself (since, if a State's own intelligence services could lawfully intercept communications themselves, they would only request this material from foreign intelligence services if it is not technically feasible for them to do so), they must nevertheless be circumscribed sufficiently to prevent – in so far as possible – States from using this power to circumvent either domestic law or their Convention obligations."

The Court carefully assessed the quality of the legal basis in the respondent State for intelligence sharing having regard to these considerations. It found that the domestic law was compliant with Article 8 requirements. Importantly, the Court observed as follows.

> "445. The Court has always been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights ... and in recent years it has expressly acknowledged – in response to complaints invoking a wide range of Convention Articles – the very real threat that Contracting States currently face on account of international terrorism ...
>
> 446. Faced with such a threat, the Court has considered it legitimate for Contracting States to take a firm stand against

> those who contribute to terrorist acts ... Due to the nature of global terrorism, and in particular the complexity of global terror networks, the Court accepts that taking such a stand – and thus preventing the perpetration of violent acts endangering the lives of innocent people – requires a flow of information between the security services of many countries in all parts of the world. As, in the present case, this 'information flow' was embedded into a legislative context providing considerable safeguards against abuse, the Court would accept that the resulting interference was kept to that which was 'necessary in a democratic society'."

(c) Acquisition of communications data from Communications Services Providers

The Court found a breach of Article 8 on this point (which concerns neither bulk interception of communications nor interception of content). It noted that the regime was not in accordance with domestic law, as interpreted by the domestic authorities in the light of recent judgments of the Court of Justice of the European Union in this area. The interference alleged by the relevant applicants was not therefore "in accordance with the law".

Private and family life

Lozovyye v. Russia[127] concerned the authorities' failure to notify parents of their son's death.

In 2005 the applicants' son was murdered. He was buried before they were notified of his death. Some measures had been taken by an investigator from the competent prosecutor's office – without success – to trace family members with a view to enabling them to join the criminal proceedings as victims. Having eventually learnt of their son's death, the applicants were allowed to have his body exhumed. He was subsequently given a family burial in his home town. The applicants unsuccessfully sued for compensation.

In the Convention proceedings, the applicants alleged a violation of their right to respect for their private and family life guaranteed by Article 8 of the Convention. The Court found for the applicants.

The judgment is of interest in that this is the first time that the Court has addressed the scope of Article 8 of the Convention in circumstances where it is alleged that the State failed in its duty to inform the next of kin of the death of a close family member. This is a question which concerns the State's positive obligations to protect the values guaranteed by

127. *Lozovyye v. Russia*, no. 4587/09, 24 April 2018.

Article 8, in the instant case the right to respect for private and family life.

The Court expressed the positive obligation in the following terms (paragraph 38):

> "The Court ... takes the view that in situations such as the one in the present case, where the State authorities, but not other family members, are aware of a death, there is an obligation for the relevant authorities to at least undertake reasonable steps to ensure that surviving members of the family are informed."

Interestingly, it found that the domestic law and practice on this matter lacked clarity, but that was not of itself sufficient to find a breach of Article 8. The crucial issue was the adequacy of the authorities' response. The Court confined itself to the circumstances of the case. The scope of the obligation in this area will of course vary depending on the facts, for example, the impossibility of identifying the deceased person will no doubt have a bearing on the intensity of the obligation. Here, the identity of the applicants' son was known to the authorities, and there were various options available to them to establish that the applicants were the parents of the deceased (for example, using the records of telephone calls he received or made), to locate them and to notify them of their son's death. It could not be concluded that they had made all reasonable and practical efforts to discharge their positive obligation. Significantly, the trial court in the criminal proceedings criticised the investigator who had been tasked with locating the next of kin (see above) for failing to take sufficient steps in this connection, having regard to the information at her disposal.

Solska and Rybicka v. Poland[128] concerned the exhumation of deceased persons' remains in the context of a criminal investigation without the consent of the families.

As part of the ongoing investigation into the crash of the Polish Air Force plane in Smolensk in April 2010 which resulted in the death of all ninety-six persons on board, including the President of Poland and many high-ranking officials, the State Prosecutor's Office ordered in 2016 the exhumation of eighty-three of the bodies. The intention was to conduct autopsies to determine among other things the cause of death and to verify the hypothesis of an alleged explosion on board the plane. The applicants' husbands died in the crash. They objected to the exhumation

128. *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, 20 September 2018.

of their remains, but to no avail. There was no possibility of independent review of or appeal against the decision.

The applicants complained in the Convention proceedings of a breach of Article 8 of the Convention. The Court agreed.

The following points may be highlighted.

This is the first occasion on which the Court has addressed the applicability of Article 8 to a situation where family members oppose the exhumation of the remains of a deceased relative for the purposes of a criminal investigation. It held that the applicants could invoke the protection of Article 8 under both its family and private-life heads. The Court was able to draw on case-law on related matters demonstrating that issues pertaining to the way in which the body of a deceased relative was treated, as well as issues regarding the ability to attend a burial and pay respects at the grave of a relative, have been recognised as coming within the scope of the right to respect for family or private life under Article 8 (see, most recently, *Lozovyye v. Russia*[129], where the Court held that the applicants' right to respect for their private and family life had been affected by the failure of the State to inform them of their son's death before he had been buried).

It is noteworthy that the Court situated its analysis of the interference with the applicants' Article 8 rights within the framework of the respondent State's procedural obligation under Article 2 to carry out an effective investigation into the cause of the plane crash and the consequential loss of life.

In describing the scope of a Convention-compliant investigation in the light of its established case-law (see *Armani Da Silva v. the United Kingdom*[130], and the cases referred to therein), the Court noted that, where appropriate, the authorities are required to perform an autopsy on the body of a deceased (ibid., § 233). Importantly, it observed that an effective investigation may, in some circumstances, require the exhumation of the remains of a body (see, *mutatis mutandis*, *Tagayeva and Others v. Russia*[131]), and there may be circumstances in which exhumation is justified, despite the family's opposition.

At the same time, the Court stressed that a due balance had to be found between the requirements of an effective investigation and the private and family-life interests which may be implicated. In the instant case the investigation concerned "an incident of unprecedented gravity, which affected the entire functioning of the State". Nevertheless, "the requirements of the investigation's effectiveness ha[d] to be reconciled

129. *Lozovyye v. Russia*, no. 4587/09, § 34, 24 April 2018.

130. *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 232-39, 30 March 2016.

131. *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 509, 13 April 2017.

to the highest possible degree with the right to respect for [the applicants'] private and family life".

The Court found that domestic law did not provide for any weighing of interests in the applicants' case. When issuing his order, the prosecutor was not required to assess whether the aims of the investigation could have been attained through less restrictive means, nor was he required to evaluate the possible implications of the impugned measures for the private and family life of the applicants. Furthermore, the prosecutor's decision was not amenable to appeal before a criminal court or any other form of adequate scrutiny before an independent authority. In sum, Polish law did not provide sufficient safeguards against arbitrariness with regard to a prosecutorial decision ordering exhumation. The applicants were thus deprived of the minimum degree of protection to which they were entitled. The interference was not therefore "in accordance with the law" and the Court was thus dispensed from having to review compliance with the other requirements of Article 8 § 2.

Private and family life and home

National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France[132] concerns the impact of anti-doping measures on the rights of sportsmen and women.

The applications were introduced by a number of representative sports associations and leading sportsmen and one sportswoman. The applicants contested the impact that the domestic "whereabouts" measures had on their right to respect for their private and family life and home (as well as on their right to freedom of movement). The applicants criticised the intrusive nature of the measures imposed on those selected to form the annual testing pool for doping controls, namely the obligation to provide detailed, accurate and at all times up-to-date information for the coming three-month period on their daily whereabouts – including when they were not in competition or training or were in places unrelated to their sports activities. Of particular concern to them was the accompanying requirement to specify for each day of the week a one-hour slot between 6 a.m. and 9 p.m. when they would be available for unannounced testing at the location indicated. They pointed out the negative repercussions this regime had on the management and planning of their daily and family life as well as on their right to respect their home given that drugs tests could be conducted there.

132. *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, 18 January 2018.

The applications were declared inadmissible as regards both the sports associations and a large number of individual applicants for failure to demonstrate that they had been directly and individually affected by the impugned restrictions.

The judgment is noteworthy as regards the remaining applicants in that the case marks the first occasion on which the Court has examined in detail the application of Convention law to the area of sport. It is of further interest in that the Court also addressed the issues raised by the case from the standpoint of international and European law standards embodied in instruments such as Unesco's International Convention against Doping in Sport (19 October 2005, "the Unesco Convention"), the (non-binding) World Anti-Doping Code (2009 version) and the Council of Europe's Anti-Doping Convention (19 November 1989). It is of interest that the World Anti-Doping Agency, which prepared the World Anti-Doping Code, intervened in the proceedings as a third party, which is a measure of their importance for countries in general in tackling this issue. Also of interest is the fact that France modelled its approach when adopting the "whereabouts" requirement on the recommendations contained in the World Anti-Doping Code, which, in accordance with the Unesco Convention, are binding on States Parties to it. France has ratified that Convention. This was a matter of considerable significance for the Court when examining whether France had exceeded its margin of appreciation when balancing the competing interests in this field.

The Court accepted that the "whereabouts" requirement interfered with the values of private and family life and home protected by Article 8. Among other considerations it noted that the obligation to be present at a specified location each day of the week for a specified one-hour period impacted on the quality of the applicants' private life and also entailed consequences for the enjoyment of their family life. In addition to restricting their personal autonomy as regards the planning of their day-to-day private and family life, the Court further observed that the requirement could lead to a situation in which applicants had no other choice but to choose their home address as the designated place for the purpose of testing for doping, with implications for their right to enjoy their home.

The Court accepted that the impugned measure was in accordance with the law. Regarding the legitimacy of the aim pursued, it was satisfied that the "whereabouts" requirement had been introduced in order to address the protection of the health of sports professionals and, beyond that group, the health of others, especially young people engaged in sport. Moreover, it could accept that the requirement was linked to

the promotion of fair play by eliminating the use of substances which conferred an unfair advantage on the user, as well as any dangerous incentive which their use may be seen to have, especially by young amateur sportsmen and women, for increasing performance on the sports field. Importantly, the Court also observed that spectators should be able to expect that the sports events they attended reflected fair-play values. For these reasons, the Court considered that the "whereabouts" restrictions could further be justified in terms of the protection of the rights and freedoms of others. The Court's analysis of the legitimacy issue is interesting in view of its readiness to draw on the aims and objectives underpinning the international texts in this area.

Turning to the question of necessity, the Court underscored two fundamental considerations when assessing the existence of a pressing social need for the impugned measures. Firstly, the scientific and other expert studies attested to the harmful effects of doping on the health of sports professionals; the dangers of its use beyond that circle, especially among young people involved in sport, were also well documented. On that latter point, which is a public-health consideration, the Court, in line with the international material referred to above, accepted that sports professionals must be expected to serve as exemplary role models given their influence on young people aspiring to succeed on the sports field. Secondly, tracing the history of regulation in this area, the Court noted that there was a consensus at the European and international levels on the need for States to take action against doping in sport. Given the difficult scientific, legal and ethical issues involved in this area, States must be afforded a wide margin of appreciation under the Convention when deciding how to react at the national level. Such margin can be shaped by the existence of a consensus at the international level on the type of anti-doping strategies to be adopted. For its part, France, like other member States which had ratified the Unesco Convention, implemented in its domestic law the "whereabouts" provisions of the World Anti-Doping Code (2009 version) drafted by the World Anti-Doping Agency (see above). France's action was thus in line with the international consensus on the need to combat doping by means of "whereabouts" measures and unannounced doping tests.

As to whether a fair balance had been struck between the applicants' Article 8 rights and the aims relied on by the respondent State – the protection of health and the rights and freedoms of others – the Court attached weight to the following considerations: inclusion in the testing pool was limited in principle to one year; it was for those selected for inclusion to indicate where they could be located, including at their home if that was their choice, as well as the one-hour slot when they

would be available for testing; the implementation of the "whereabouts" measure was accompanied by procedural safeguards enabling individuals to contest before the courts both their selection and any sanctions imposed on them for failure to comply with the measure.

For the Court, a fair balance had been struck, and there had been no breach of Article 8.

Home

The decision in *F.J.M. v. the United Kingdom*[133] concerned the relationship between landlords and tenants in the private sector compared to the public sector and the application of the proportionality test in this context.

The applicant suffers from mental-health problems. Her parents bought a house on the strength of a mortgage, pledging the house as security. The applicant lived there, paying rent to her parents. After a certain time, the applicant's parents (the mortgagors) defaulted on the mortgage payments. The mortgagee sought a possession order, the grant of which would have brought the applicant's tenancy to an end. The applicant unsuccessfully resisted the grant of the order in the domestic proceedings. In the Convention proceedings she complained under Article 8 that the possession order was a disproportionate measure and that she was unable to have its proportionality determined by a court. The Court found her complaint to be manifestly ill-founded and therefore inadmissible.

The decision is interesting in that it allowed the Court to confirm its recent decision in *Vrzić v. Croatia*[134]. In that decision, the Court expressly acknowledged, for the first time, that the principle that any person at risk of losing his or her home should be able to have the proportionality of the measure determined by an independent tribunal did not automatically apply in cases where possession was sought by a private individual or body. On the contrary, the protection of the Convention rights of the private individuals or bodies concerned and the balance to be struck between their respective interests could be embodied in domestic legislation.

The conclusion in *Vrzić*, cited above, was in contrast to the approach developed by the Court in response to complaints under Article 8 of the Convention lodged by tenants of State-owned or socially owned property faced with, for example, the threat of eviction (see *Panyushkiny*

133. *F.J.M. v. the United Kingdom* (dec.), no. 76202/16, 26 November 2018.
134. *Vrzić v. Croatia*, no. 43777/13, 12 July 2016.

v. Russia[135]; *Pinnock and Walker v. the United Kingdom*[136]; *Kay and Others v. the United Kingdom*[137]; *Paulić v. Croatia*[138]; *McCann v. the United Kingdom*[139]; and *Connors v. the United Kingdom*[140]). In such cases – the "public landlord" cases – the Court found that the applicant tenants, even if their right to occupation had come to an end, should be able to obtain a ruling from a domestic court on whether, given their individual circumstances, their eviction was a proportionate response to the pressing social need relied on by the authorities.

Interestingly the Court in the instant case, drawing on and developing the reasoning in *Vrzić*, cited above, rationalised the difference in approach in the following terms (paragraph 42).

> "As the Court noted in *Vrzić,* in such cases there are other, private, interests at stake which must be weighed against those of the applicant. However, the distinction in fact runs deeper than that. ... there are many instances in which the domestic courts are called upon to strike a fair balance between the Convention rights of two individuals. What sets claims for possession by private-sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected ... If the domestic courts could override the balance struck by the legislation in such a case, the Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into."

The Court noted that the applicant's case had to be viewed against the background of domestic legislation which set out how the Convention rights of the interested parties were to be respected and reflected the State's assessment of where the balance should be struck between the Article 8 rights of residential tenants (such as the applicant) and the Article 1 of Protocol No. 1 rights of private-sector landlords (in effect, the mortgagee in the instant case given that the applicant's parents had secured the mortgage by pledging the house as security).

Reviewing the domestic courts' treatment of the issues raised by the applicant's case, the Court observed that in striking that balance the authorities had had regard, *inter alia*, to the general public interest in

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135. *Panyushkiny v. Russia*, no. 47056/11, 21 November 2017.
136. *Pinnock and Walker v. the United Kingdom* (dec.), no. 31673/11, 24 September 2013.
137. *Kay and Others v. the United Kingdom*, no. 37341/06, 21 September 2010.
138. *Paulić v. Croatia*, no. 3572/06, 22 October 2009.
139. *McCann v. the United Kingdom*, no. 19009/04, ECHR 2008.
140. *Connors v. the United Kingdom*, no. 66746/01, 27 May 2004.

reinvigorating the private residential rented sector, something which the domestic courts in the applicant's case had accepted was best achieved through contractual certainty and consistency in the application of the relevant law. It was also noteworthy that the applicant had agreed to the terms of the tenancy and the applicable legislation clearly defined the nature of those terms and the circumstances in which the tenancy could be brought to an end. Significantly, the Court added, in line with the domestic courts' views, that if a private tenant could require a court to conduct a proportionality assessment before making a possession order, the resulting impact on the private rental sector would be wholly unpredictable and potentially very damaging. Finally, it attached importance to the fact that the domestic legislation had made provision for cases of exceptional hardship by allowing the courts to delay the enforcement of the possession order for a period of time.

In sum, the Court's decision reflects the specific features of the private rental market and the consequential lower level of Article 8 protection afforded to private tenants in terms of procedural safeguards and intensity of judicial review.

Freedom of expression (Article 10)

Freedom of expression

Sekmadienis Ltd. v. Lithuania[141] concerned commercial speech using religious symbolism.

The applicant company published advertisements on public hoardings intended to promote a range of clothing using models depicting religious figures from the Christian faith. The religious symbolism was reinforced by captions intended for comic effect. Around one hundred complaints were lodged, which led to legal proceedings against the applicant company. The domestic courts ultimately found that the advertisements were contrary to public morals and in breach of the relevant provisions of the Law on advertising in force at the material time. The applicant company was fined. In the view of the domestic courts, and among other considerations, the advertisements had been inappropriate, made use of religious symbols for superficial purposes and "promoted a lifestyle which was incompatible with the principles of a religious person".

The applicant company complained in the Convention proceedings that the fine amounted to an unjustified interference with its right to freedom of expression under Article 10 of the Convention. The Court agreed with it.

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141. *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, 30 January 2018.

The judgment is of interest given that the Court ruled that, in the circumstances of the case, the respondent State had exceeded its margin of appreciation in the area of commercial speech or advertising, which, according to the established case-law, is broad (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*[142], and *Mouvement raëlien suisse v. Switzerland*[143]). Of equal relevance in this case is the fact that States are also afforded a broad margin when regulating speech which is liable to offend against religious beliefs or convictions (see, for example, *Murphy v. Ireland*[144]). According to the Court's case-law those exercising Article 10 rights have a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see, for example, *Murphy*, cited above, § 65, and *Giniewski v. France*[145]).

The Court's inquiry in the instant case was therefore directed at establishing whether the domestic courts had overstepped that margin and in particular whether they had provided relevant and sufficient reasons to justify the existence of a pressing social need for the interference with the applicant's Article 10 rights. The Court placed emphasis on the following considerations.

In the first place, the advertisements did not appear to be gratuitously offensive or profane, nor did they incite hatred on the grounds of religious belief or attack a religion in an unwarranted or abusive manner.

Secondly, the domestic courts failed to provide relevant and sufficient reasons for their finding that the advertisements were contrary to public morals. For the Court, their explanations were "declarative and vague" and offered no insight into why, for example, a lifestyle which was "incompatible with the principles of a religious person" would necessarily be incompatible with public morals. Interestingly, it noted in this connection that, even though all the domestic decisions referred to "religious people", the only religious group that had been consulted in the domestic proceedings had been the Roman Catholic Church, thereby equating morals with the values of one particular religious tradition.

Thirdly, and importantly, in response to the Government's argument that the advertisements must also have been considered offensive by the majority of the Lithuanian population who shared the Christian faith, the Court observed (paragraph 82) that:

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142. *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165.

143. *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012 (extracts).

144. *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX (extracts).

145. *Giniewski v. France*, no. 64016/00, § 43, ECHR 2006-I.

> "... even assuming that the majority of the Lithuanian population were indeed to find the advertisements offensive, the Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to, *inter alia*, freedom of expression would become merely theoretical rather than practical and effective as required by the Convention ..."

In concluding, the Court found that the authorities gave absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression.

Big Brother Watch and Others v. the United Kingdom[146] related to safeguards against arbitrariness and abuse of power in the areas of surveillance and interception of communications and acquisition of communications data.

The applicants complained in the Convention proceedings of the scope and scale of the electronic surveillance programmes operated by the authorities of the respondent State.

In particular, the Court considered on the merits complaints brought by a journalist and a newsgathering organisation under Article 10 of the Convention regarding the negative impact the operation of the bulk-interception regime and the regime for the acquisition of communications data from Communications Services Providers had on the protection of confidential journalistic material. The applicants criticised in particular the absence of adequate safeguards under both regimes. The Court agreed with these applicants. Importantly, it observed (paragraph 492) that as regards the bulk-interception regime

> "... the surveillance measures ... are not aimed at monitoring journalists or uncovering journalistic sources. Generally the authorities would only know when examining the intercepted communications if a journalist's communications had been intercepted. Consequently, it confirms that the interception of such communications could not, by itself, be characterised as a particularly serious interference with freedom of expression ... However, the interference will be greater should these communications be selected for examination and, in the Court's view, will only be 'justified by an overriding

146. *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 13 September 2018 (not final). See also under Article 8 (Private life) above.

> requirement in the public interest' if accompanied by sufficient safeguards relating both to the circumstances in which they may be selected intentionally for examination, and to the protection of confidentiality where they have been selected, either intentionally or otherwise, for examination."

The Court found that the applicable legislation was deficient on these matters, noting among other considerations that there were no requirements – at least, no "above the waterline" requirements – either circumscribing the intelligence services' power to search for confidential journalistic or other material (for example, by using a journalist's email address as a selector), or requiring analysts, in selecting material for examination, to give any particular consideration to whether such material is or may be involved.

Interestingly, the Court also found a breach of Article 10 as regards the operation of the regime for the acquisition of communications data from Communications Services Providers. Essentially, it found that the applicable domestic-law provisions did not comply with lawfulness requirements for the purposes of Article 10. While there were provisions affording enhanced protection where data were sought for the purpose of identifying a journalist's source, they did not apply in every case where there was a request for the communications data of a journalist. Furthermore, in cases concerning access to a journalist's communications data there were no special provisions restricting access to the purpose of combating "serious crime".

Freedom of the press

Magyar Jeti Zrt v. Hungary[147] concerned the "duties and responsibilities" of a media organisation when posting a hyperlink to material later found to be defamatory.

The applicant company operated an online news portal. It published an article on an allegedly anti-Roma inspired incident outside a school. It also posted, without further comment, a hyperlink to an interview available on YouTube given by a Roma representative to a media outlet regarding the same incident. The interview was later found to be defamatory of a political party named in the interview. The domestic courts ruled that the applicant company, by posting the hyperlink, had disseminated the interview and was therefore objectively liable under Article 78 of the Civil Code for having shared the defamatory content of the interview with others, irrespective of whether it had acted in good

147. *Magyar Jeti Zrt v. Hungary*, no. 11257/16, 4 December 2018 (not final).

faith and in compliance with the ethics of journalism. In the Convention proceedings the applicant company complained of an infringement of its right to freedom of expression. The Court ruled in its favour.

The judgment is noteworthy given that this is the first occasion on which the Court has had to address under Article 10 the publication of a hyperlink which directs the reader to material which is later adjudged by the domestic courts to damage the reputation of a third party. The Court summarised the essential differences between hyperlinks and traditional forms of publication in the following terms.

> "73. ... bearing in mind the role of the Internet in enhancing the public's access to news and information, the Court points out that the very purpose of hyperlinks is, by directing to other pages and web resources, to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other.
>
> 74. Hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet. They do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website.
>
> 75. A further distinguishing feature of hyperlinks, compared to acts of dissemination of information, is that the person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link ... Additionally, the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public."

Importantly the Court considered that whether the posting of a hyperlink constitutes dissemination of defamatory information requires the domestic courts to conduct an individual assessment in each case and to give relevant and sufficient reasons for imposing liability on the provider of the hyperlink. It noted a series of pertinent questions in this connection, which were not addressed by the domestic courts when imposing liability on the applicant company: (i) did the applicant company endorse the impugned content; (ii) did it repeat the impugned content (without endorsing it); (iii) did it merely insert a hyperlink to the

impugned content (without endorsing or repeating it); (iv) did it know or could it have reasonably known that the impugned content was defamatory or otherwise unlawful; (v) did it act in good faith and respect the ethics of journalism as well as the requirement of due diligence (paragraph 77).

On the facts of the applicant company's case, the Court noted among other things that the article in question did not refer to the hyperlinked material in a way that repeated the defamatory statements. The article made no mention of the political party which brought the defamation proceedings. Furthermore, the author did not suggest that the statements which could be accessed via the hyperlink were true or that he endorsed them. The Court also attached importance to the fact that, prior to the initiation of the defamation proceedings, the applicant company did not know that the linked content was possibly defamatory, which would have required it to disable access to the content.

For the Court, the domestic courts had based themselves on Article 78 of the Civil Code and had concluded that an act of hyperlinking amounted to dissemination of information. For that reason alone, the objective liability of the applicant company was engaged in accordance with domestic law, thereby leaving no scope for the courts to balance the political party's right to reputation and the applicant company's right to freedom of expression. There had thus been a breach of Article 10.

Freedom of assembly and association (Article 11)

Freedom of peaceful assembly

In *Navalnyy v. Russia*[148], the applicant was a political activist, anti-corruption campaigner and popular blogger, as well as one of the most significant opposition figures in Russia. This case concerns seven occasions, between March 2012 and February 2014, when he was arrested, provisionally detained and convicted of administrative offences on account of his alleged participation in unauthorised but peaceful public gatherings. On the fifth occasion, the applicant was penalised when he left a stationary demonstration in a group of people. On the sixth occasion, he found himself in a group of activists in front of a courthouse because they had been denied entry to the court hearing.

The Grand Chamber found violations of Articles 5 and 6: his detention had been unjustified and arbitrary (Article 5) and the findings in six of the seven proceedings were not based on an acceptable assessment of the

148. *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018. See also under Article 18 (Restrictions not prescribed by the Convention) below.

facts (Article 6). It also found a violation of Article 11. The Grand Chamber found that the Article 18 complaint required a separate examination and that it had been violated. Finally, indications on general measures to be adopted were provided under Article 46 of the Convention.

(i) Two points concerning the Court's approach to Article 11 are worth noting.

– The Grand Chamber examined separately the legitimate aim(s) pursued by the authorities. While it had serious doubts that any legitimate aim had been served by five of the arrests, it found a violation of Article 11 because the fifth and sixth arrests were not found to have pursued a legitimate aim. This case is therefore one of those rare cases[149] where the absence of a legitimate aim constituted, of itself, a violation of the Convention.

– The remaining five arrests were found by the Grand Chamber to be disproportionate restrictions of the applicant's right to freedom of assembly under Article 11 of the Convention. This violation was based on familiar reasoning concerning a lack of tolerance by the authorities of unauthorised but peaceful demonstrations[150]. However, the Grand Chamber also went on to broaden the focus of its findings. It considered that these five episodes were indicative of a persistent failure by the authorities to show the tolerance required, despite a clear line of Court judgments against Russia setting out those requirements, including judgments delivered before the present arrests. This lack of tolerance was considered to constitute another dimension of the previously identified structural inadequacy[151] of the regulatory framework which failed to provide effective legal safeguards against arbitrary interferences with the right to freedom of assembly. That domestic law failed to provide effective safeguards was further exemplified by the finding in the present case that no legitimate aim had been pursued by two of the arrests.

(ii) In addition, this is the first time the Court has found a violation of Article 18 in conjunction with an Article (Article 11) other than Article 5

149. As cited in *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017; *Khuzhin and Others v. Russia*, no. 13470/02, 23 October 2008; *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009; *P. and S. v. Poland*, no. 57375/08, 30 October 2012; and *Karajanov v. the former Yugoslav Republic of Macedonia*, no. 2229/15, 6 April 2017.

150. For example, *Malofeyeva v. Russia*, no. 36673/04, 30 May 2013; *Kasparov and Others v. Russia*, no. 21613/07, 3 October 2013; *Navalnyy and Yashin v. Russia*, no. 76204/11, 4 December 2014; *Novikova and Others v. Russia*, nos. 25501/07 and 4 others, 26 April 2016; and *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, 7 February 2017.

151. See, in particular, *Lashmankin and Others*, cited above, §§ 471-77.

of the Convention. This combination is possible since Article 11 permits restrictions of the kind to which Article 18 refers.

(iii) Finally, and of particular relevance to the respondent State, the Grand Chamber indicated under Article 46 certain general measures to be taken. It drew on a pattern of similar violations cited and established in *Lashmankin and Others*, on the violation of Article 11 in the present case (linked as it was to the structural inadequacy of the regulatory framework), as well as on the findings under Article 18 of the Convention. It called for the adoption by the respondent State of, *inter alia*, appropriate legislative and/or other general measures to secure a domestic mechanism requiring the competent authorities to have due regard to, notably, the fundamental character of the freedom of peaceful assembly and to show appropriate tolerance towards unauthorised but peaceful gatherings which did not cause disruption to ordinary life going beyond the level of minor disturbance.

Prohibition of discrimination (Article 14)

Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

The judgment in *Molla Sali v. Greece*[152] concerned the application of Sharia law and discrimination by association.

The applicant's husband was a member of the Muslim community in Thrace. On his death the applicant inherited all of his property under a notarised will drawn up in accordance with the Civil Code. A first-instance court approved the will, the applicant accepted the estate and registered the property transferred to her. The deceased's two sisters challenged the will and were unsuccessful before the courts of first and second instance. The Court of Cassation then found that, pursuant to the 1913 Treaty of Athens, matters of inheritance among the Muslim minority were to be settled according to Sharia law, according to which notarised wills drawn up by Greek nationals of Muslim faith were devoid of legal effect (Sharia law only recognises intestate succession and Islamic wills). As a result, the applicant lost three-quarters of the property her husband had bequeathed to her. She relied on Articles 6 and 14 of the Convention and Article 1 of Protocol No. 1.

The Grand Chamber examined her complaints under Article 14 taken in conjunction with Article 1 of Protocol No. 1, the focus of the case being the refusal to apply the Civil Code given the Muslim faith of the testator. The Grand Chamber found a violation of these provisions.

152. *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018.

In January 2018 the regulations imposing recourse to Sharia law for the settlement of family-law cases within the Muslim minority were abolished, a development which did not apply to the present applicant's situation.

This was the first time the Court had examined the application by a domestic court of Sharia law against the will of the applicant. It did so through the prism of Article 14, focusing on the difference in treatment between beneficiaries of a will drawn up under the Civil Code by a Muslim testator, on the one hand, and, on the other, by a non-Muslim testator. While the Court accepted that Greece might have wished to honour its international obligations and the situation of the Thrace minority, the reasons for the impugned difference in treatment, derived notably from international obligations, were not considered persuasive. The Court concluded that there was no objective and reasonable justification for the impugned difference in treatment. A number of points are worth noting.

(i) This is also the first application by the Grand Chamber of the principle of discrimination by association. Since the focus of the case was a difference in treatment due to the Muslim faith of the *testator* (as opposed to the applicant), the Grand Chamber confirmed as follows.

> "134. ... In this context, the Court reiterates that the words 'other status' have generally been given a wide meaning in its case-law ... and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent ... For example, a discrimination issue arose in cases where the applicants' status, which served as the alleged basis for discriminatory treatment, was determined in relation to their family situation, such as their children's place of residence (see *Efe v. Austria*, no. 9134/06, § 48, 8 January 2013). It thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favorably on the basis of another person's status or protected characteristics (see *Guberina v. Croatia*, no. 23682/13, § 78, 22 March 2016; *Škorjanec v. Croatia*, no. 25536/14, § 55, 28 March 2017; and *Weller v. Hungary*, no. 44399/05, § 37, 31 March 2009)."

(ii) This judgment has, moreover, provided the Court with a rare opportunity to reinforce certain principles governing the protection of minorities. The Court found that it could not be assumed that a testator of Muslim faith, having drawn up a will in accordance with the Civil Code, had automatically waived his right, or that of his beneficiaries, not to be discriminated against on the basis of his religion. The State could

not take on the role of guarantor of the minority identity of a specific population group to the detriment of the right of that group's members to choose not to belong to it or not to follow its practices and rules:

> "157. Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities, that is to say the right to free self-identification. The negative aspect of this right, namely the right to choose not to be treated as a member of a minority, is not limited in the same way as the positive aspect of that right The choice in question is completely free, provided it is informed. It must be respected both by the other members of the minority and by the State itself. That is supported by Article 3 § 1 of the Council of Europe Framework Convention for the Protection of National Minorities which provides as follows: 'no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.' The right to free self-identification is not a right specific to the Framework Convention. It is the 'cornerstone' of international law on the protection of minorities in general. This applies especially to the negative aspect of the right: no bilateral or multilateral treaty or other instrument requires anyone to submit against his or her wishes to a special regime in terms of protection of minorities."

(iii) A number of other elements of the Court's reasoning are worth highlighting. While the Court accepted that the State had undertaken to respect the customs of the Muslim minority in ratifying the Treaties of Sèvres and Lausanne, it did not consider that those treaties required Greece to apply Sharia law and, indeed, the Government and the applicant had agreed on that point. In addition, the domestic courts disagreed as to whether the application of Sharia law was compatible with the principle of equal treatment and with international human rights standards: those divergences were serious (between courts of the same judicial branch, between the Court of Cassation and the civil courts and between the Court of Cassation and the Supreme Administrative Court) and the legal uncertainty created by such divergence was incompatible with the rule of law. Furthermore, several international bodies had expressed their concern about the application of Sharia law to Greek Muslims in Western Thrace and about the resulting discrimination, in particular against women and children, not only within that minority as compared to men, but also in relation to non-Muslims (notably, the Council of Europe Commissioner for Human Rights).

(iv) Lastly, the comparative position was also very clear. Outside of the sphere of private international law (and the possibility of applying Sharia law as a source of foreign law in the event of a conflict of laws, subject to the requirements of public policy), only France had officially applied some provisions of Sharia law and that was to citizens of one of its overseas territories (Mayotte) and this limited application of Sharia law had ended in 2011. In the United Kingdom, the application of Sharia law by the Sharia Councils is accepted only in so far as recourse to it remains voluntary. Therefore Greece was the only country in Europe which, up until the material time, had applied Sharia law to a section of its citizens against their wishes[153].

Protection of property (Article 1 of Protocol No. 1)

Enjoyment of possessions

O'Sullivan McCarthy Mussel Development Ltd v. Ireland[154] concerned measures taken by the respondent State to comply with a judgment of the Court of Justice of the European Union (CJEU) finding that it had infringed European Union environmental law.

The applicant company fished for mussel seed, which it was authorised to do on an annual basis. Its activities were conducted in a harbour which had been designated as a specially protected site in accordance with domestic law giving effect to EU Directives on the protection of the environment. In 2007 the CJEU, following infringement proceedings initiated by the European Commission in 2004, found, among others matters, that Ireland had failed to comply with its obligations under one such Directive (Article 6 § 3) of the Habitats Directive) by not carrying out assessments of the impact of aquaculture activities (such as mussel-seed fishing) on the environmental integrity of specially protected sites (such as the harbour where the applicant company conducted its economic activity). In response to the CJEU's finding, the authorities temporarily suspended the applicant company's authorisation to fish for mussel seed in the harbour in order to implement a compliance strategy in consultation with the Commission. The applicant company was ultimately unsuccessful in the domestic proceedings it brought to challenge the measure and claim compensation.

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153. See also the draft resolution of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, adopted on 13 December 2018, "*Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories of the 'Cairo Declaration'?*".

154. *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, 7 June 2018.

In the Convention proceedings, the applicant company alleged, among other things, that there had been a violation of its rights under Article 1 of Protocol No. 1 due to economic loss for which it held the domestic authorities responsible and for which it had received no compensation.

The Court found that there had been no breach of that provision. The following points may be highlighted.

Firstly, as to the applicability of Article 1 of Protocol No. 1, the Court observed that the applicant company had been authorised to fish for mussel seed in the harbour. That was its business activity, made possible by the grant of the relevant permission, and it was that activity, linked to the official authorisation, which amounted to its "possessions". The temporary prohibition on mussel-seed fishing in the harbour constituted an interference in the form of a control of use of its right to the peaceful enjoyment of its "possessions" (see also *Malik v. the United Kingdom*[155], and *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[156]). Interestingly, the Court went on to observe that in assessing the nature and extent of the interference it would bear in mind, among other matters, that the authorisation had not been withdrawn or revoked and that the impugned interference consisted of a temporary prohibition of part of the applicant company's activities.

Secondly, regarding the aim of the interference, the Court readily accepted that the measure was intended to protect the environment and to comply with the State's obligations under EU law, and in respect of both matters it enjoyed a wide margin of appreciation. Regarding the protection of the environment in particular, the Court took the opportunity to point out once again (paragraph 109) that

> "... this is an increasingly important consideration in today's society, having become a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities (see, for example, *Depalle*, cited above, § 81; see also *Matczyński*, cited above, § 101). Public authorities assume a responsibility which should in practice result in their intervention at the appropriate time to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective (see, for example, *S.C. Fiercolect Impex S.R.L. v. Romania*, no. 26429/07, § 65, 13 December 2016). ..."

Thirdly, the Court had to address the Government's argument that the impugned interference stemmed directly from the judgment of the

155. *Malik v. the United Kingdom*, no. 23780/08, §§ 91-92 and 94, 13 March 2012.

156. *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 177-78, ECHR 2012.

CJEU in the infringement proceedings, which meant that the domestic authorities had no room for manoeuvre. This is the first time that the so-called "*Bosphorus* presumption of equivalent protection" issue has been framed in these terms in Convention proceedings. Previous cases have involved EU Regulations (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[157], and *Avotiņš v. Latvia*[158]), or Directives (*Michaud v. France*[159]). It is noteworthy that the Court found that the conditions for applying the *Bosphorus* presumption had not been met in the specific circumstances of the case, being of the view that, even if the judgment was binding on the respondent State, it was still left with some margin of manoeuvre in determining how to secure compliance. The Court observed (paragraph 112) as follows.

> "In the present case, the obligation on the respondent State derived principally from Article 6 § 3 of the Habitats Directive. Ireland's failure to fulfil its obligation thereunder was established in infringement proceedings, entailing a duty on the State to comply with the CJEU's judgment and the secondary legislation examined in the context of those proceedings. While it was therefore clear that the respondent State had to comply with the Directive and, with immediacy, the CJEU judgment, both were results to be achieved and neither mandated how compliance was to be effected. The respondent State was therefore not wholly deprived of a margin of manoeuvre in this respect. On the contrary, the domestic authorities retained some scope to negotiate with the Commission regarding the steps to be taken ... This included, at the proposal of the respondent State, both priority treatment and particular interim measures for Castlemaine harbour that were implemented with the agreement of the Commission. As the Court has previously stated, the presence of some margin of manoeuvre is capable of obstructing the application of the presumption of equivalent protection (see *Michaud*, cited above, § 113; see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011). "

Interestingly, the Court left open the question whether a judgment of the CJEU in infringement proceedings could in other circumstances be regarded as leaving no margin of manoeuvre for the member State in question.

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157. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

158. *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 101-05, 23 May 2016.

159. *Michaud v. France*, no. 12323/11, ECHR 2012.

Finally, as to the proportionality of the interference, the Court found several reasons for concluding that a fair balance had been struck in the instant case. Among other considerations, it noted the following.

(i) At least from the date of the CJEU judgment (2007), and arguably from the bringing of the infringement proceedings by the Commission (2004), the applicant company, being a commercial operator, should have been aware of a possible risk of interruption of, or at least some consequences for, its usual commercial activities (see *Pine Valley Developments Ltd and Others v. Ireland*[160]; see also, *mutatis mutandis*, *Forminster Enterprises Limited v. the Czech Republic*[161]). The extent and consequences of any infringement judgment could not be foreseen, but the risk of some interruption could clearly not be excluded;

(ii) While the impugned interference had an appreciable adverse impact on the applicant company's business, the Court considered that it was not in a position to find, as an established fact, that the applicant company's loss of profits was the inevitable and immitigable consequence of the temporary closure of the harbour;

(iii) The applicant company was not required to cease all of its operations in 2008, and in 2009 it was able to resume its usual level of business activity; the harbour in question was in fact given priority over other specially protected sites when it came to the carrying out of environmental impact assessments;

(iv) The weight of the legitimate aims pursued, and the strength of the general interest in the respondent State in achieving full and general compliance with its obligations under EU environmental law. It is noteworthy that the Court observed in this connection that the fact that the respondent State was found not to have fulfilled its obligations under EU law should not be taken, for the purposes of Article 1 of Protocol No. 1, as diminishing the importance of the aims of the impugned interference, or as lessening the weight to be attributed to them;

(v) Compliance with the CJEU's judgment was not confined to the harbour in question. There were many other specially protected sites throughout the country which also had to be brought into line with the State's obligations under EU environmental law. For the Court, achieving compliance on this wide scale, and within an acceptable time frame, could certainly be regarded as a matter of general interest of the

160. *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 59, Series A no. 222.

161. *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 65, 9 October 2008.

community, attracting a wide margin of appreciation for the domestic authorities.

Könyv-Tár Kft and Others v. Hungary[162] concerned the adoption of measures in the school-procurement sector resulting in the loss of the applicant companies' clientele.

The applicant companies supplied textbooks to schools. This sector, the distribution or supply sector, was unregulated and was subject to competitive forces. The authorities decided to place the supply of schoolbooks to schools under the responsibility of a State-owned entity. The legislative measures became effective from the school year beginning in September 2013 and formed part of the reform of the organisation of the State's public-education system. The applicants complained under Article 1 of Protocol No. 1.

The Court had to decide, as a matter of admissibility, on whether Article 1 of Protocol No. 1 was applicable in the instant case. The Government pleaded that the applicant companies could only rely on a mere hope that they would be able to continue to operate under the previous unregulated system and to continue to enjoy indefinitely the advantages which had accrued to them. The Court answered that argument with reference to its established case-law on the circumstances in which the building-up of a clientele can be considered to give rise to an asset and therefore "possessions" within the meaning of Article 1. The judgment provides a comprehensive overview of the case-law in this area (*Iatridis v. Greece*[163]; *Van Marle and Others v. the Netherlands*[164]; *Malik v. the United Kingdom*[165]; *Döring v. Germany*[166]; *Wendenburg and Others v. Germany*[167]; *Buzescu v. Romania*[168]; and *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*[169]). Applying that case-law, the Court found as follows (paragraph 32).

> "[T]he applicant companies, who had been in the schoolbook-distribution business for years, had built up close relations with the

162. *Könyv-Tár Kft and Others v. Hungary*, no. 21623/13, 16 October 2018 (not final).
163. *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II.
164. *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101.
165. *Malik v. the United Kingdom*, no. 23780/08, § 89, 13 March 2012.
166. *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999-VIII.
167. *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II (extracts).
168. *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005.
169. *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*, no. 35264/04, § 54, 30 November 2010.

> schools located in their vicinity. The volume of clients in this business is limited, as it will always correspond to the number of schools and pupils in a given region. The Court is therefore convinced that the clientele – although somewhat volatile in nature – is an essential basis for the applicant companies' established business, which cannot, by the nature of things, be easily benefited from in other trading activities. Indeed, the applicant companies' lost clientele has in many respects the nature of a private right, and thus constitutes an asset, being a 'possession' within the meaning of Article 1 of Protocol No. 1 (see *Van Marle and Others*, *Döring*, and *Wendenburg and Others*, all cited above). ..."

G.I.E.M. S.r.l. and Others v. Italy[170] concerned the confiscation of property in the absence of a criminal conviction and the principle of legality.

The applicants are companies incorporated under Italian law and an Italian citizen, Mr Gironda. Court orders, confiscating their land and buildings, were issued against them on the ground of unlawful development of their land. However, no criminal proceedings for unlawful development had been issued against the directors of G.I.E.M. S.r.l., the other applicant companies had not been parties to the criminal proceedings against their directors and, although Mr Gironda had been a defendant in criminal proceedings, that action had been discontinued as time-barred. The applicants relied on Article 7 of the Convention and Article 1 of Protocol No. 1.

The Grand Chamber found, as in *Sud Fondi S.r.l. and Others v. Italy*[171], a violation of Article 1 of Protocol No. 1 in respect of all the applicants. A number of points are worth noting.

The Grand Chamber did not pronounce on whether the violation of Article 7 it had concluded meant that the confiscations were devoid of legal basis and thus a breach of Article 1 of Protocol No. 1.

Although the Court noted the legitimacy of policies in favour of environmental protection (*Depalle v. France*[172], and *Brosset-Triboulet and Others v. France*[173]), it was left in some doubt as to whether the confiscation measures had actually contributed to that aim.

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170. *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018. See also under Article 6 § 2 (Presumption of innocence) and Article 7 (No punishment without law) above.

171. *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009.

172. *Depalle v. France* [GC], no. 34044/02, § 84, ECHR 2010.

173. *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 87, 29 March 2010.

The proportionality of the interference was assessed having regard to a number of factors identified by the Grand Chamber, which included the degree of culpability or negligence on the part of the applicants or, at the very least, the relationship between their conduct and the offence in question.

The importance of procedural guarantees was also emphasised in that respect, as judicial proceedings concerning the right to the peaceful enjoyment of possessions had to afford an individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by Article 1 of Protocol No. 1.

The judgment in *Lekić v. Slovenia*[174] concerned lifting the corporate veil by the State to ensure market stability and financial discipline.

The Financial Operations of Companies Act 1999 ("the FOCA") allowed the courts to strike off inactive companies and hold "active members" liable for company debt. The aim was to ensure market stability and financial discipline: a large number of dormant companies existed with debts and no assets (as a result of the transition from a socialist to a free-market economy) and the more usual winding-up proceedings would have inundated the courts. "Active member" was defined by the Constitutional Court in 2002 as those in a position to influence the company's operations. The company, of which the applicant was a minority shareholder (and a former managing director), was struck off and, following enforcement proceedings (2002-07), the applicant was held liable for a debt of the company. The Grand Chamber found that there had been no violation of Article 1 of Protocol No. 1.

This is the first time the Court has determined the principles by which it will assess the necessity under Article 1 of Protocol No. 1 of a State measure, contested by the applicant, lifting the corporate veil[175].

(i) The Court's review of the lawfulness, and notably of the foreseeability, of the interference provides guidance as to the level of attention a State can expect a minority shareholder to pay to the

174. *Lekić v. Slovenia* [GC], no. 36480/07, 11 December 2018.

175. In *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* ([GC], no. 60642/08, ECHR 2014), mainly under Article 1 of Protocol No. 1 concerning a failure to pay the debts of a State-owned bank, and in earlier cases concerning a failure to enforce domestic judgments against State-owned companies under Article 6 of the Convention and Article 1 of Protocol No. 1 (cases cited in Ališić *and Others* at §§ 114-15), the Court established the responsibility of the State to discharge the relevant debts and did not address the lifting of the corporate veil implicit in those findings.

activities of the company and the relevant regulatory framework. The Court reiterated the high degree of caution expected of a professional, including taking special care in assessing the risks that an activity entails (*Cantoni v. France*[176], and *Karácsony and Others v. Hungary*[177]), which principles applied to persons engaging in commercial activities (*Špaček, s.r.o., v. the Czech Republic*[178], and *Forminster Enterprises Limited v. the Czech Republic*[179]). As a minority shareholder and former managing director, the applicant had been well aware of the state of the company and of the proceedings by the creditor in question and he should have been aware of the provisions of the FOCA (*J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*[180]). Interestingly, the Constitutional Court's definition of "active member" (those in a position to influence the company with at least 10% of the shares) was considered not arbitrary given the statutory rights enjoyed by those with such a shareholding and given the similar benchmark of relevant international organisations (such as the Organisation for Economic Co-operation and Development in its Benchmark Definition of Foreign Direct Investment, 4th Edition 2008). Finally, while the decisions in the striking-off proceedings were served on the company and not the applicant, the Court effectively endorsed the view that the applicant, as an active member, should have been aware of the risks and taken steps to collect the company's letters, adding that "as long as the members ... maintained the company's existence ..., they should have ensured some basic management [of it]".

(ii) As to whether a fair balance had been struck by the impugned measure between the competing interests involved, the Grand Chamber accepted that the impugned measure was in the public interest and, notably, that there could be a paramount need for a State to act to avoid irreparable harm to the economy as well as to enhance legal security and market confidence.

(a) In the first place, the Grand Chamber identified the particular principles relevant to the fair-balance exercise in this context. In *Agrotexim and Others v. Greece*[181] the Court had found that lifting the corporate veil and disregarding the company's legal personality would

176. *Cantoni v. France*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

177. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016.

178. *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, 9 November 1999.

179. *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, 9 October 2008.

180. *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, ECHR 2007-III.

181. *Agrotexim and Others v. Greece*, 24 October 1995, Series A no. 330-A.

be justified only in exceptional circumstances. However, the Grand Chamber relied on a judgment of the International Court of Justice (*Barcelona Traction, Light and Power Company, Limited*[182]) to distinguish, on the one hand, claims to lift the corporate veil "from within" the company by shareholders who wish to be acknowledged as victims (as in *Agrotexim and Others*, cited above; see also *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[183]) and, on the other, claims to lift the corporate veil by or in favour of a creditor "from without", as in the present case. While the *Agrotexim and Others* case-law could not therefore be transposed to the present case, the Grand Chamber nevertheless found that, in assessing fair balance, it would "take into account" the principle that lifting the corporate veil and holding a shareholder liable for company debts should be made necessary "by exceptional circumstances and counterbalanced by specific safeguards" and it clarified that "exceptional" concerned the nature of the issues and not their frequency.

(b) The Court went on to apply those principles and to carry out the balancing exercise in the present case.

– It would appear that the "exceptional circumstances" concerned the *general market situation* faced by the State when legislating in 1999. The Court noted, *inter alia*, the serious and post-socialist problems in Slovenia concerning 6,500 dormant companies not complying with the basic conditions companies had to satisfy in a free market; that the situation was of some urgency; the parameters of the legislation; the need to address the position of unpaid creditors; as well as the quality and depth of the various legislative and judicial reviews over the years (*Animal Defenders International v. the United Kingdom*[184]).

– The Grand Chamber went on to consider the particular *situation of the applicant* including: the extent of his shareholding (11.11%); his involvement in the company (former managing director, still active in the company); his rights and obligations as a minority shareholder; as well as the modest nature of the debt to be discharged by him. It also reviewed the specific *situation of the company*: it had not been adequately capitalised even when it was converted into a limited liability company and was thus in breach of company law; it did not apply for winding-up for years and then it failed to pay the fees; and, since the FOCA only became applicable one year after it had come into

182. *Barcelona Traction, Light and Power Company, Limited*, judgment of 5 February 1970, *ICJ Reports* 1970, p. 3.

183. *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012.

184. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts).

force, the company and its shareholders had had a period of one year to issue proceedings to have it wound up, thus avoiding the application of the FOCA and shareholder liability for company debts. Account was also taken of the *position of the creditor*, which had been subjected to prolonged uncertainty as regards payment of the debt. Interestingly, the Court rejected the applicant's claim that the FOCA was against the fundamental principles of company law in the European Union and, notably, contrary to the judgment of the Court of Justice of the European Union in *Idryma Typou AE v. Ypourgos Typou kai Meson Mazikis Enimerosis*[185]: the breach in that case had been based on the fact that liability was imposed on shareholders for fines as regards a matter on which those shareholders had no influence.

(c) Consequently, all of the above considerations (in particular, his involvement in the running of the company, the amount of the debt paid by him and the national context) led the Court to conclude that the impugned measure did not entail the imposition of an individual and excessive burden on the applicant and to find that there had been no breach of Article 1 of Protocol No. 1.

It would appear therefore that the "exceptional circumstances" and "counterbalancing safeguards" are elements to be taken into account, but that the compatibility with Article 1 of Protocol No. 1 of a measure to lift the corporate veil "from without" will also depend on the particular facts of each case and on, *inter alia*, the situation of the relevant actors (shareholder, company and creditor) in question.

Control of the use of property

Könyv-Tár Kft and Others v. Hungary[186] concerned the adoption of measures in the school-procurement sector resulting in the loss of the applicant companies' clientele.

The applicant companies supplied textbooks to schools. This sector, the distribution or supply sector, was unregulated and was subject to competitive forces. The authorities decided to place the supply of schoolbooks to schools under the responsibility of a State-owned entity. The legislative measures became effective from the school year beginning in September 2013 and formed part of the reform of the organisation of the State's public-education system. The applicant companies complained under Article 1 of Protocol No. 1 that the State's

185. Judgment of the Court of Justice of the European Union of 21 October 2010 in *Idryma Typou AE v. Ypourgos Typou kai Meson Mazikis Enimerosis*, C-81/09, EU:C:2010:622.

186. *Könyv-Tár Kft and Others v. Hungary*, no. 21623/13, 16 October 2018 (not final). See also under Article 1 of Protocol No. 1 (Possessions) above.

new monopoly effectively barred them from the school-supply market, which was their exclusive or major field of activity, and that they were not compensated for their consequential financial losses. The Court found a breach of that Article.

Apart from the question of the applicability of Article 1 of Protocol No. 1, the judgment is of interest in two respects.

Firstly, the Government emphasised that the primary reason for introducing the impugned legislation had been to strengthen the market position of the procurer *vis-à-vis* publishers in order to ensure a more efficient spending of public funds. The Court, however, was not persuaded by this argument. It noted among other things that the prices of schoolbooks were and remained State-regulated, entailing no benefit for parents and pupils in financial terms. Interestingly, it was prepared to assume that the reform measure pursued a legitimate aim.

Secondly, and importantly, the Court held on the merits that the impugned interference, seen as a control of use, was disproportionate in the circumstances and failed to strike a fair balance between the interests at stake. It noted from its own analysis of the school-supply market that the measure impugned by the applicants could not be justified in terms of the need either to protect the individuals who ultimately paid for textbooks and used them, namely parents and pupils, or to ensure fair competition in the market in question. For the Court, the measure introduced a system of schoolbook procurement whereby the applicant companies' entire clientele was taken over by a State-owned entity and, as from the 2013/14 school year, they found themselves practically excluded from negotiating schoolbook-distribution contracts. The Court also gave weight to a number of other considerations, including: the applicant companies only had an eighteen-month period to adjust to the new circumstances; no measures were put in place to protect them from arbitrariness or to offer them redress in terms of compensation; the new State monopoly in the school-supply sector made it impossible for the applicants to continue or reconstitute their business outside the sector; the absence of real benefits for parents or pupils.

The judgment is important given that the Court observed that this is an area in which the respondent State enjoyed a wide margin of appreciation when determining the nature, scope and manner of implementation of reform measures, but went on to find a breach of the Convention. It stressed in this connection (paragraph 58) that such measures

> "... must not be disproportionate in terms of the means employed and the aim sought to be realised; and must not expose the

business players concerned to an individual and excessive burden. In the present case the drastic change to the applicant companies' business was not alleviated by any positive measures proposed by the State. Moreover, the intervention concerned a business activity that was not subject to previous regulations, the business activities were not in any sense dangerous, and the applicants were not expected to assume that the business would be *de facto* monopolised by the State (see *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.*; as well as, *a contrario*, *Pinnacle Meat Processors Company and 8 Others*; *Ian Edgar (Liverpool) Ltd*, and *Tipp 24 AG*, all cited above)".

Positive obligations

Kurşun v. Turkey[187] concerned the destruction of the applicant's property as a result of an explosion at an oil refinery and the scope of the State's positive and procedural obligations in respect of the right of ownership.

The applicant's property was destroyed as a result of an explosion at a nearby oil refinery operated by Tüpraş, a State-owned entity at the time. Several investigations were conducted into, among other things, the cause of the explosion and responsibility for it. The conclusions of the different investigations were not entirely conclusive as regards the issue of responsibility. Criminal proceedings initiated against a number of executives of Tüpraş were ultimately discontinued for reasons of prescription. The applicant took civil proceedings against Tüpraş, but his claim for compensation was finally dismissed by the Court of Cassation because of his failure to comply with the one-year time-limit for suing a tortfeasor contained in Article 60 § 1 of the former Code of Obligations. According to that provision, tort actions had to be brought within one year of the date on which the victim acquired knowledge of both the damage *and* the identity of those responsible. In the opinion of the Court of Cassation, the applicant should be considered to have known that Tüpraş was responsible for the explosion on the date it occurred. His claim was therefore out of time.

In the Convention proceedings, the applicant complained of the above events under Article 6 of the Convention (right of access to a court) and Article 1 of Protocol No. 1.

The Court found a breach of Article 6 as regards the manner in which the relevant chamber of the Court of Cassation interpreted and applied the time-limit in the applicant's civil action.

187. *Kurşun v. Turkey*, no. 22677/10, 30 October 2018. See also under Article 6 § 1 (Access to a court) above.

The Court's finding had implications for part of its reasoning under Article 1 of Protocol No. 1. Under those provisions the applicant complained among other things that the State authorities had neither taken the necessary preventive measures to protect his right to property, nor subsequently provided him with adequate remedies to enable him to vindicate his rights. Moreover, the criminal proceedings initiated after the incident had not complied with the requirements of effectiveness as described by the Court in *Öneryıldız v. Turkey*[188].

The Court noted that the operation of the refinery undoubtedly constituted a dangerous industrial activity. It observed that it had already held that in a situation where lives and property were lost as a result of a dangerous activity occurring under the responsibility of the public authorities, the scope of the measures required for the protection of dwellings was indistinguishable from the scope of those to be taken in order to protect the lives of residents (in essence, an adequate regulatory framework providing for all necessary safeguards in order to avoid risk to life – see *Öneryıldız*, cited above, §§ 106-08 and 134-36; *Budayeva and Others v. Russia*[189]; and *Kolyadenko and Others v. Russia*[190]). It then turned to the question whether the applicant had had effective remedies to challenge the alleged failure of the State to protect his property, bearing in mind the applicant's criticism of the lack of effectiveness of the above-mentioned criminal proceedings and his reliance on the *Öneryıldız* standards. Importantly, it noted in this latter connection (paragraph 121) that

> "... the duty to make available an effective *criminal-law remedy* as such does not have the same significance with regard to destroyed property as in the event of loss of life in this particular context (see, *mutatis mutandis*, *Budayeva and Others*, cited above, § 178; and compare with other types of interference with property rights that may require a criminal-law response, such as the deliberate destruction of property in the case of *Selçuk and Asker v. Turkey*, 24 April 1998, § 96, *Reports* 1998-II, or where the infringement is of a criminal nature, such as in the case of *Blumberga v. Latvia*, no. 70930/01, § 67, 14 October 2008). Even taking into account the complexity of the circumstances at issue, the Court does not consider that the stringent procedural requirements originally developed for use in cases involving the use of lethal force, and applied exceptionally to the very special circumstances as those

188. *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

189. *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 173, ECHR 2008 (extracts).

190. *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, § 216, 28 February 2012.

> arising in cases such as *Öneryıldız* despite the non-intentional nature of the deaths at issue (see, for instance, *Oruk v. Turkey*, no. 33647/04, §§ 50 and 65, 4 February 2014, and *Sinim v. Turkey*, no. 9441/10, §§ 62-64, 6 June 2017), can be readily applied in the present circumstances where the applicant's complaint concerned mere property damage."

This statement represents a development in the case-law as regards the scope of the State's procedural obligations in this area. It is noteworthy that the Court agreed with the applicant that the criminal proceedings had been inadequate but went on to observe that an action for compensation against Tüpraş and the responsible State authorities before the civil and administrative courts "would not only be capable, but perhaps also more suitable, to provide the applicant with adequate redress". Interestingly, the Court found it unnecessary to examine the admissibility or the merits of the applicant's complaints concerning the alleged direct responsibility of Tüpraş for the explosion and the consequential damage to his property, taking into account the conclusion it had reached under Article 6 of the Convention. As to the applicant's grievances against the State authorities, the Court noted that, although the prosecuting authorities were not required of their own motion to open a criminal investigation into whether there had been a failure by the State to avert the explosion, he could have requested them to do so. However, of greater significance is the Court's emphasis on the importance of the compensatory remedy in this area. Consistent with its above approach to the notion of an effective remedy in respect of Tüpraş, the Court noted that the administrative courts were, in principle, empowered to establish the facts of the case, to attribute responsibility for the events in question and to deliver enforceable decisions. The applicant did not bring an administrative action against the State, and had therefore failed to exhaust an effective remedy.

Right to free elections (Article 3 of Protocol No. 1)

Free expression of the opinion of the people

In *Selahattin Demirtaş v. Turkey (no. 2)*[191], the Court examined the compatibility with Article 3 of Protocol No. 1 of a member of parliament's continued pre-trial detention following his lawful arrest and detention.

The applicant was an elected member of the National Assembly and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-

191. *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018 (not final). See also under Article 5 § 3 (Length of pre-trial detention) above and Article 18 (Restrictions not prescribed by the Convention) below.

wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform, encouraged by the President of Turkey, had its origin in clashes in Syria between Daesh and the forces of an organisation with links to the PKK, the fear of a spill-over of violence into Turkey, and the occurrence of serious violence in October 2014 in several Turkish towns and further outbreaks of violence in Turkey in the wake of the breakdown in 2015 of negotiations aimed at resolving the "Kurdish question". The applicant, who had made speeches and statements on these events, was one of 154 parliamentarians (including 55 HDP members) affected by the constitutional amendment. On 4 November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and inciting others to commit a criminal offence. The applicant is still in detention awaiting trial. His parliamentary mandate expired on 24 June 2018.

The Court found that Article 3 of Protocol No. 1 had been breached. This is the first occasion on which it has had to consider the compatibility of a member of parliament's (MP) pre-trial detention with that provision. Importantly, it noted that pre-trial detention did not automatically violate this provision, even if the detention was not in compliance with Article 5 § 3 of the Convention. The issue of compatibility had to be determined with reference to several factors, in particular, whether the domestic courts, when deciding to prolong an MP's detention, demonstrated that they weighed in the balance the interests served by his or her continued detention and those underpinning the rights guaranteed by Article 3 of Protocol No. 1, including the right to sit as an MP once elected. Furthermore, it stressed that whether or not the prolongation of detention was a proportionate measure had to be assessed from the standpoint of its length and the consequential impact on an MP's ability to perform his functions effectively.

Applying these considerations, the Court observed that the applicant was prevented from participating in the activities of the National Assembly (including voting) for one year, seven months and twenty days of his mandate. It noted that it had found earlier under Article 5 § 3 that the domestic courts did not give sufficient reasons for prolonging his detention. A central feature of the Court's reasoning is the failure of the domestic courts to have sufficient regard to the fact that not only was the applicant an MP, he was also the leader of an opposition party "whose performance of his parliamentary duties required a high level of protection"; nor did it appear from the case file that the domestic

courts genuinely considered the application of alternative measures to pre-trial detention. The Court's reasoning is noteworthy in view of the prominence given to the role of an MP within the framework of the guarantees contained in Article 3 of Protocol No. 1. It also provided an important backdrop to the Court's consideration of the applicant's Article 18 complaint.

OTHER CONVENTION PROVISIONS

Derogation in time of emergency (Article 15)

The judgments in *Mehmet Hasan Altan v. Turkey* and *Şahin Alpay v. Turkey*[192] concerned the validity of a derogation for the purposes of Article 15 of the Convention.

Following the attempted *coup* in Turkey during the night of 15 to 16 July 2016, on 20 July 2016 the Government declared a state of emergency and on 21 July 2016 notified the Secretary General of the Council of Europe of its derogation from certain of its Convention obligations. The applicants, well-known journalists, were arrested and held in pre-trial detention on anti-terrorism charges related to the attempted *coup*. The Constitutional Court found that their arrest and detention violated their rights to liberty and to freedom of expression and awarded them damages and costs and expenses. The assize court, considering that the Constitutional Court judgments were not binding, did not act on them and the applicants remained in detention. The applicants mainly complained under Article 5 § 1 of the absence of a reasonable suspicion that they had committed an offence justifying their pre-trial detention, and that their arrest and pre-trial detention had violated their Article 10 rights. The Court found that there had been a violation of Article 5 § 1 and of Article 10 of the Convention.

The Commissioner for Human Rights of the Council of Europe exercised his right to submit written comments (Article 36 § 3 of the Convention). Third-party observations (Article 36 § 2 of the Convention) were also received from the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, with several non-governmental organisations also submitting observations jointly.

The cases are important in the context of Turkey, constituting as they do the Court's first judgments on the merits of complaints concerning

192. *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018. See also under Article 5 § 4 (Speediness of the review) above.

arrest and pre-trial detention on charges related to the attempted *coup* in 2016 in Turkey. A number of case-law points are worth noting.

(i) There being relatively few cases in which the Court has examined derogations, certain aspects of its review of the validity of the derogation under Article 15 of the Convention are worth noting.

The first question to be addressed was the fact that the derogation did not refer to the Convention Articles from which the measures adopted by the Government might derogate. The Court did not consider this to undermine the validity of the derogation: noting that neither of the parties had disputed the point, the Court accepted that the derogation fulfilled the formal requirements of Article 15 § 3 of the Convention. Secondly, and referring in particular to the findings of the Constitutional Court, the Court found that the attempted military *coup* amounted to a "public emergency threatening the life of the nation". Thirdly, the Court found that the next question – whether the measures were strictly required by the exigencies of the situation – required an examination on the merits of the applicants' complaints, thereby linking the merits of the complaints with the validity of the derogation. It went on to find, having regard to the assize court's failure to implement the clear and unambiguous judgments of the Constitutional Court, that the applicants' pre-trial detention was "unlawful" and "not in accordance with the law" contrary to Article 5 § 1. The Court found, as did the Constitutional Court, that such a deficiency meant, in turn, that the derogation could not be considered proportionate or therefore valid, so that the Court could conclude that there had been a violation of Article 5 § 1 of the Convention. The same approach was adopted as regards Article 10: again relying on the findings of the Constitutional Court, the Court found the interference with the applicants' freedom of expression to be disproportionate and that this was sufficient, in turn, to find the derogation to be disproportionate and invalid, so that it could conclude that there had been a violation of Article 10 of the Convention.

(ii) It is also interesting to note that, because the finding of a violation of Article 5 § 1 was based on the failure by the assize court to implement the judgments of the Constitutional Court, the Court considered it necessary to explain that those findings under Article 5 § 1 did not modify its constant precedent according to which the right of individual petition before the Constitutional Court constitutes an effective remedy as regards complaints concerning pre-trial detention for those deprived of their liberty under Article 19 of the Constitution

(see, for example, *Koçintar v. Turkey*[193]). Nevertheless, it reserved the possibility of re-examining the effectiveness of this remedy in future cases concerning complaints under Article 5 of the Convention, at which stage it would be for the Government to demonstrate its effectiveness in law and in practice (*Uzun v. Turkey*[194]).

Restrictions not prescribed by the Convention (Article 18)

The judgment in *Navalnyy v. Russia*[195] develops the case-law on the link between the lack of "legitimate aim" in the sense of Article 11 and ulterior purpose as regards Article 18.

The applicant was a political activist, anti-corruption campaigner and popular blogger, as well as one of the most significant opposition figures in Russia. This case concerns seven occasions, between March 2012 and February 2014, when he was arrested, provisionally detained and convicted of administrative offences on account of his alleged participation in unauthorised but peaceful public gatherings. On the fifth occasion, the applicant was penalised when he left a stationary demonstration in a group of people. On the sixth occasion, he found himself in a group of activists in front of a courthouse because they had been denied entry to the court hearing.

The Grand Chamber found a violation of Article 11.

For the first time, the Court found a violation of Article 18 in conjunction with an Article (Article 11) other than Article 5 of the Convention. This combination is possible since Article 11 permits restrictions of the kind to which Article 18 refers.

The Grand Chamber considered, referring to the judgment in *Merabishvili v. Georgia*[196], that Article 18 represented a "fundamental aspect" of the case to be examined separately. It also clarified that the lack of a legitimate aim (fifth and sixth arrests) could not amount, of itself, to a violation of Article 18, so it was still necessary to examine whether there was an identifiable ulterior purpose. In addition, and regarding the five occasions for which a legitimate aim had been identified, it was still necessary to examine whether there had been a plurality of purposes.

193. *Koçintar v. Turkey* (dec.), no. 77429/12, § 44, 1 July 2014.

194. *Uzun v. Turkey* (dec.), no. 10755/13, § 71, 30 April 2013.

195. *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018. See also under Article 11 (Freedom of peaceful assembly) above.

196. *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

Three elements weighed heavily in the Court's finding of a violation. In the first place, the Grand Chamber's approach was to examine the sequence of arrests. It found that, on the one hand, the pretexts for the seven arrests became progressively more implausible while, on the other, the degree of potential or actual disorder as well as the role of the applicant had diminished, all of this culminating in the fifth and sixth arrests for which no legitimate aim had been found. The *Merabishvili* case-law, to the effect that the predominant purpose might change over time, was particularly relevant here. Secondly, the Court relied on contextual matters, concerning the applicant directly and the more general situation. As noted above, the authorities were aware when arresting the applicant on the occasions in issue from this Court's case-law that the impugned practices were incompatible with the Convention. Relevant also was the sequence of events that unfolded in two sets of criminal proceedings conducted in parallel against the applicant (*Navalnyy and Ofitserov v. Russia*[197] and *Navalnyye v. Russia*[198]). More generally, there was "converging contextual evidence" corroborating the view that the authorities were becoming increasingly severe in their response to the conduct of the applicant as an opposition leader and of other political activists and, indeed, in their approach to public assemblies of a political nature. In particular, legislative changes (examined in and adopted since the judgment in *Lashmankin and Others v. Russia*[199]) had continued to restrict freedom of assembly, about which concerns had been expressed by several Council of Europe bodies. Thirdly, the Grand Chamber considered that targeting the applicant as an opposition politician, affecting as it did not only fellow activists or supporters but the very essence of democracy, would amount to an ulterior purpose of "significant gravity" (see the "nature and degree of reprehensibility of the alleged ulterior purpose", *Merabishvili*, cited above, § 307). The Grand Chamber concluded that it had been established beyond reasonable doubt that the fifth and sixth arrests pursued an ulterior purpose within the meaning of Article 18 of the Convention, namely to suppress political pluralism which forms part of effective political democracy governed by the rule of law.

Additionally, and of particular relevance to the respondent State, the Grand Chamber indicated under Article 46 certain general measures to be taken. It drew on a pattern of similar violations cited and established in *Lashmankin and Others*, on the violation of Article 11 in the present

197. *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016.

198. *Navalnyye v. Russia*, no. 101/15, 17 October 2017.

199. *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, 7 February 2017.

case (linked as it was to the structural inadequacy of the regulatory framework), as well as on the findings under Article 18 of the Convention.

In *Selahattin Demirtaş v. Turkey (no. 2)*[200] the Court examined Article 18 of the Convention in conjunction with Article 5 § 3.

The applicant was an elected member of the National Assembly and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. The applicant was one of 154 parliamentarians affected by the constitutional amendment. On 4 November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and inciting others to commit a criminal offence. The applicant is still in detention awaiting trial. His parliamentary mandate expired on 24 June 2018.

The applicant contended in essence that his detention was intended to silence him because of his opposition to the government in power. The Court found that there had been a breach of Article 18 in conjunction with Article 5 § 3. It is significant that this is the first case in which the Court has found that Article 18 can be relied on in conjunction with Article 5 § 3 (as opposed to Article 5 § 1), and it is also of interest that the Court did not consider it necessary to dwell on the applicability of Article 18, confining itself to noting that "it was a fundamental aspect of the ... case which had not been examined under Article 5 of the Convention or Article 3 of Protocol No. 1". Taking as its basis the principles set out in *Merabishvili v. Georgia*[201], the Court's inquiry was directed at ascertaining whether the evidence at its disposal proved *beyond reasonable doubt* that the *predominant purpose* behind the prolongation of the applicant's detention was to remove him from the political scene, bearing in mind its finding that his arrest and detention were at all times lawful in terms of Article 5 § 1 (Articles 100 et seq. of the Criminal Code) and Article 5 § 1 (c) (the persistence of "reasonable suspicion" that he had committed an offence). The Court drew in this connection on its findings under Article 5 § 3 and Article 3 of Protocol No. 1 and, in line with the approach in *Merabishvili* (cited

200. *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018 (not final). See also under Article 5 § 3 (Length of pre-trial detention) and Article 3 of Protocol No. 1 (Free expression of the opinion of the people) above.

201. *Merabishvili v. Georgia* [GC] no. 72508/13, §§ 257-58, 28 November 2017.

above), the surrounding political and social context as described by, among others, the third-party interveners. This contextual analysis led it to conclude that there was a political purpose behind the applicant's continuing detention (for the Court's analysis of the applicant's political role, the tense political situation, speeches targeting the applicant and his party, the timing of his continued detention (it coincided with a highly important referendum and a presidential election), an emerging pattern of silencing opposition members of parliament, etc.). It further found that that purpose was the predominant one, taking into account that in continuing situations the predominant purpose may vary over time and having regard to factors such as the nature and degree of reprehensibility of the alleged ulterior purpose). The Court's conclusion is noteworthy:

> "273. Having regard to the foregoing, and in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, the Court finds that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society ..."

Significantly, the Court ruled under Article 46 of the Convention that the respondent State must take all necessary measures to put an end to the applicant's pre-trial detention.

Request for revision of a judgment (Rule 80 of the Rules of Court)

Ireland v. the United Kingdom[202] concerned the interpretation and application of Rule 80 of the Rules of Court in the context of a request for revision of a judgment of the Court in an inter-State case.

In its judgment of 18 January 1978 in *Ireland v. the United Kingdom*[203] the Court ruled that the respondent Government's use of five specific interrogation techniques against fourteen detainees had amounted to a practice of inhuman and degrading treatment in breach of Article 3 of the Convention. However, and contrary to the findings of the

202. *Ireland v. the United Kingdom*, no. 5310/71, 20 March 2018.

203. *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25.

Commission, it concluded that their use had not given rise to a practice of torture (see §§ 165-68 of the original judgment, and, as regards the nature of the interrogation techniques, §§ 96-104 and 106-07). In a request filed with the Court on 4 December 2014 pursuant to Rule 80 of the Rules of Court[204], the applicant Government sought the revision of the judgment, but only in so far as the Court had declined to characterise also as torture the application of the five techniques to the detainees. They relied on a television report of 4 June 2014 which had drawn attention to the factual content of documentary materials which, had it been known to the Court at the relevant time, would, in their view, have had a decisive influence on the manner in which the Court had treated the issue of torture. In essence, the applicant Government contended that the materials which had been uncovered revealed, firstly, that a Dr L. called by the respondent Government to give evidence before the Commission had misled the latter regarding the long-term effects of the above-mentioned five techniques and, secondly, that the then respondent Government had adopted a clear policy of withholding from the Convention institutions information regarding the use of these techniques.

The revision judgment is noteworthy for a number of reasons.

In the first place, and in contrast to other revision requests, the instant request was not aimed at modifying the Court's finding on the merits. The applicant Government asserted that the new facts that had come to light required a modification of the reasons on which the finding of a breach of Article 3 was based to the effect that the use of the five techniques should be qualified as inhuman and degrading treatment *as well as* torture. The Court accepted that the issue raised could be the subject of a revision request, noting, among other things, the distinction it has drawn in its case-law between torture and other forms of conduct proscribed by Article 3.

Secondly, this is the first time that the Court has had to consider and apply its case-law under Rule 80 in the context of a revision request concerning a judgment delivered in an inter-State case. It is also rare for a request to be based on facts which, as with the instant request, emerged (long) after the delivery of a judgment.

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204. Rule 80 § 1 of the Rules of Court provides as follows: "A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment."

Thirdly, the Court premised its analysis of the request on the fact that revision is an exceptional procedure, bearing in mind the final character of the Court's judgments. It underscored that requests for revision must therefore be subjected to strict scrutiny. That view informed its approach to the treatment of the two essential requirements determining the admissibility of a revision request, namely "whether the documents submitted by the applicant Government disclose[d] new facts 'which by their nature might have a decisive influence' and whether the revision request has been submitted within the six-month time-limit".

The Court accepted that the revision request, which had been submitted on 4 December 2014, complied with the six-month requirement contained in Rule 80 § 1, since it had been made within six months after the date the applicant Government had acquired knowledge of the new facts relied on, that is, 4 June 2014, the date of the television broadcast. It is noteworthy that the new facts relied on by the applicant Government emerged *after* the delivery of the original judgment. In that connection, the Court observed that it could be argued that once aware of possible grounds for revision a party had to take reasonable steps to ascertain whether such grounds actually exist, in order to put the Court in a position to rule on the matter without delay. It is of interest that the Court acknowledged that the applicant Government had received prior to the date of the broadcast a number of relevant documents lodged with the United Kingdom's national archives potentially disclosing new facts. It observed, however, that the applicant Government had not remained passive following receipt of those documents and could not be criticised in the circumstances for a lack of diligence in following them up. The Court, notwithstanding the contrary view expressed by the respondent Government, doubted whether in the circumstances it could be said that the applicant Government could reasonably have acquired knowledge of the documents containing the facts relied on before 4 June 2014.

The key issue was whether the documents submitted by the applicant Government demonstrated any new facts and, if so, whether they might by their nature have had a decisive influence on the findings in the original judgment. The Court's analysis of the documents, viewed against the background of the manner in which the facts were established, led it to conclude that, as regards the testimony of Dr L. in the proceedings before the Commission (the first ground for revision), they did not provide sufficient prima facie evidence of the new fact alleged, namely that he had misled the Commission. As to the documents submitted in support of the second ground for revision (see above), the

Court found that the materials relied on did not demonstrate facts that were "unknown" to the Court when the original judgment was delivered.

However, it is noteworthy that the Court went on to find that, even assuming that the documents submitted in support of the first ground for revision demonstrated the facts alleged by the applicant Government, the revision request could not succeed. The following considerations were central to reaching this conclusion (see paragraph 122).

> "... legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that where a court has finally determined an issue, its ruling should not be called into question (see *Harkins v. the United Kingdom* (dec.) [GC], no. 71537/14, § 54, 15 June 2017). Subjecting requests for revision to strict scrutiny, the Court will only proceed to the revision of a judgment where it can be demonstrated that a particular statement or conclusion was the result of a factual error. In such a situation, the interest in correcting an evidently wrong or erroneous finding exceptionally outweighs the interest in legal certainty underlying the finality of the judgment. In contrast, where doubts remain as to whether or not a new fact actually did have a decisive influence on the original judgment, legal certainty must prevail and the final judgment must stand."

And with reference to the development of the notion of torture in the case-law since the date of the original judgment (see paragraph 125):

> "... Having regard both to the wording of Rule 80 and to the purpose of revision proceedings, a request for revision is not meant to allow a party to seek a review in the light of the Court's subsequent case-law (compare *Harkins*, cited above, § 56, in which the Court found that a development in its case-law could not by itself be considered as 'relevant new information' for the purpose of Article 35 § 2 (b) of the Convention). Consequently, the Court has to make its assessment in the light of the case-law on Article 3 of the Convention as it stood at the time."

The Court noted that the findings contained in the original judgment were not influenced by the possible long-term effects the application of the five techniques may have had on the health of the detainees. That judgment was silent on this matter. Rather, the Court had placed emphasis on the distinction between, on the one hand, torture and, on the other hand, inhuman and degrading treatment in terms of the intensity of the suffering inflicted. The Court found in the original judgment that, although the object of the five techniques was the extraction of confessions, the naming of others and/or information and

although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The distinction between "torture" and "inhuman and degrading treatment" was a question of degree, to be assessed in the light of various elements. For the Court in the revision judgment (see paragraph 135)

> "[w]ithout an indication in the original judgment that, had it been shown that the five techniques could have severe long-term psychiatric effects, this one element would have led the Court to the conclusion that the use of the five techniques occasioned such 'very serious and cruel suffering' that they had to be qualified as a practice of torture, the Court cannot conclude that the alleged new facts might have had a decisive influence on the original judgment."